(3)

No. 04-1[illegible] MAR 2 - 2005

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IN THE

United States Supreme Court

CLARENCE HARLEY,

Petitioner,

v.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition For Writ of Certiorari
To The New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

CLARENCE HARLEY
2366 Seventh Avenue – Suite 2
New York, New York 10030
212-479-7375

QUESTION(S) PRESENTED

Do New York Courts violate the V, VII and XIV Amendments by failing to address statutory law and rule designed to protect the public interest raised in a complaint?

Did the New York Courts violate the V, VII and XIV Amendments by denying the petitioner the right to bring his allegation before a jury for redress for damages to property and/or property rights?

Does the 2nd Judicial Department violate the V, VII and XIV Amendments by denying and/or discouraging state statute designed to protect the public interest by its current policy of nonfeasance?

Does a Court violate a party's due process rights by intentionally ignoring probative evidence submitted by a party?

Does an attorney have immunity from prosecution for submitting improper statements and misrepresentation tbefore a court or a committee on ethical standings?

Whether pertinent parties of the court, having knowledge of wrong doings in section 1985, fall within the proscription of 42 USCA § 1986?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court reviewing the merits appears at Appendix B to the petition. The order of the New York Appellate Court appears at Appendix C is unreported, but is available under 2004 NY Slip Op 03771.

JURISDICTION

The date on which the highest state court decided the case was September 21, 2004. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on date December 2, 2004, and a copy of the order denying a rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

V Constitutional Amendment provides in relevant part "No person shall be . . .deprived of life, liberty, or property, without due process of law . . ." *USCA Const. Amend V*

VII Constitutional Amendment provides in relevant part ". . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *USCA Const. Amend VII*

XIV Constitutional Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S.C.A Const. Amend XIV*

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Miscellaneous

Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders, 11 A.L.R.2d 1407 § 3, § 6

STATEMENT OF THE CASE

A. Current Supreme Court Action

This case was brought before the Supreme Court of New York State, Kings County in December 2000 by the petitioner pro se. The petitioner raised triable issues of fact as to whether the respondents were guilty of fraudulent misrepresentation in inducing the petitioner with the impression that a petition application filed on his behalf by his attorney had been with drawn and/or representing before the Surrogate that an agreement had been entered into to with 'unspecified' parties when the respondents had knowledge that the statements were untrue. Moreover, the petitioner raised the triable issue that the respondents and/or the participating attorneys engaged in a pattern of conduct that damaged his application for fees. The petitioner alleged that the respondent conduct either before the Surrogate and/or before the Grievance Committee triggered the provisions of Judiciary Law § 487.

The statement(s) and/or conduct by the respondent was/ were made under color of the law invoking the statutory provisions of 42 USCA 1983 and 1985. The petitioner raised the federal question invoking 42 USCA 1983, 1985 in the complaint, at the Appellate level and with the Court of Appeals as is reflected at App. 18a-24a, 27a-28a.

The relevant sections read,

> "Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. **42 USCA § 1983**
>
> ". . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person . . ." **42 USCA § 1985 (2)**

> ". . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." **42 USCA § 1985 (3)**

The petitioner is not seeking to relitigate the issue of fees or reimbursements, but prosecuting the fraud, collusion and deceit engaged in by the participating attorneys damaging the petitioner's standing in petition applications before the Surrogate pursuant to CPLR § 213(8) and Judiciary Law § 487 and the relevant federal statutes identified above.

The dismissal and denial of the appeal by the New York State Courts constitute a violation of the V, VII and XIV Amendments of the Constitution of the United States. The petitioner raised the Constitutional question in the complaint, at the Appellate level and with the Court of Appeal as is reflected at App. 24a-28a.

The record reflects that the appellate division clearly passed on these issues in its decision at App. 5a.

B. Prior Surrogate Action

In November 1994 the petitioner, through his attorney, filed an application pursuant to SCPA § 712 and/or SCPA § 711 seeking to revocation and/or suspension of letters of administration issued to Samuel Plotkin, Public Adminis-

trator, in the estate of Russell Smith. The application alleged inter alia that the public administrator, through his attorneys (the respondents), was engaged in conduct adverse to the interest of the estate by, namely but not limited to, holding personal creditors of one Russell S. Smith as priority creditors of the estate in violation of EPTL § 11-4.7(a). Russell S. Smith was decreed ineligible at the onset of his appointment as co-fiduciary of the referenced estate (C); notwithstanding, said party improperly masqueraded as the decedent on several occasions encumbering estate assets in Kings county for his own gain. Lastly, Samuel Plotkin failed to remove the respondents after being informed that the respondent Robert Adler and his law firm's appearance constituted a conflict of interest which the record affirmatively showed that respondent Robert Adler represented Russell S. Smith in the same referenced estate in a prior action before the Surrogate's Court in 1989.

The petitioner raised a SCPA § 711 and/or § 712 petition application seeking the suspension and/or revocation of letters of administration in the Estate of Russell Smith issued to the Samuel Plotkin, Public Administrator, Kings County.

The matter was compromised by the participating attorneys. The Surrogate issued an order discontinuing the proceeding on a purported stipulation appearing at App. 40a.

The application to revoke the public administrator was not decided on the merits. The order was issued without prejudice and; accordingly, does not get res judicata treatment.[1]

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[1] CPLR § 3217(c) and 11 ALR2d 1407 § 3, § 6

Finally, there were no issues raised regarding the respondents participating in collusion with his attorney or fraud, deceit or on the pending applications with court. There were no issues raised with court regarding improper and/or false declarations made by parties, acting in concert with the respondents to damage petitioner's standing in his application to validate his fees. Nor were there any issues before or entertained by the Surrogate about the respondents' misrepresentations before the grievance committee.

Consequently, all allegations and claims in the instant complaint are preserved.

C. Disposition in Supreme Court Action

The petitioner commenced this action before the Supreme Court pro se in 2000. Thereafter, the petitioner retained counsel but the attorney had to be removed for cause, *inter alia*, failing to provide copies of pleadings prepared and failing to competently and appropriately address discovery disclosure on behalf of the petitioner. In June of 2002 the petitioner retained new counsel and was directed to file the Note of Issue by October 31, 2002. The petitioner issued supplementary request for production of documents in September of 2002 and thereafter, filed the Note of Issue and the appropriate fee for jury trial on October 31, 2002.

The respondents immediately, thereafter, moved for summary judgment on or about November 1, 2002. Thereafter, on or about November 15, 2002 the respondents moved the court to vacate the note of issue. Although respondents moved for summary judgment their affidavit supporting the motion to vacate the note of issue claimed

that the case was not ready for trial since ". . . plaintiff has not appeared for deposition pursuant to this Court's various orders enumerated above, all necessary discovery proceedings have not been completed.

Respondents made these claim all after refusing to comply with the petitioners Supplemental Request for Documents appearing at App. 78a-85a and after moving the court for summary judgment motion.

Generally, in New York courts all motion practice stops once summary judgment motion is filed. However, in this case the latter motion to vacate the note of issue was moved on by Justice Rivera while the motion for summary judgment was before Justice Ruchelsman's, who had taken over the case load of Justice Rivera, heard on or about December 5, 2003 and adjourned to January 10, 2004. However, the record reflects that Justice Rivera heard and moved on the motion to vacate the note of issue on or about December 19, 2003.

Why would a party be subjected to appearing before two Justices simultaneously in one action? The motion permitted the respondents to engage in abusive disclosure tactics denied the petitioner the right to bring his allegations before a jury for redress. The conduct violated the V, VII and XIV Amendments to the Constitution.

Moreover, the record reflects the motion court deliberately ignored probative evidence before the court supporting the petitioner's fact pattern of fraud and collusion and/or deceit between the participating attorneys at App. 18a-203.

The court ignored evidence of petitioner's attorney compromising and/or settling petitioner's claim without con-

sent at App. 45a vis-à-vis his affirmative instructions at App. 35a-36a. The court ignored the petitioners own attorney violating CPLR 321(b) and her confession in her December 5, 1997 letter at App. 38a-39a claiming that she did not submit any papers to the court.

An attorney may not settle or compromise his client's action in the absence of consent (Silver v Parkdale Bake Shop, Inc. 8 AD2d 607, 184 NYS2d 714).

The court ignored the petitioner, having standing, fined $10,000 by the Surrogate (reflective in the Surrogate Transcript) without cause.

Justice Ruchelsman's determination that the petitioner entered into an open court agreement with the respondent at App. 10a is improper and incredibly did not even represent an argument advanced by respondents or affirmatively reflected within the record. Moreover, material determination in the decision lacked fidelity to the transcript and/or record before the court. The petitioner raised all of the above issues at the Appellate level and with the Court of Appeals as is reflected at App. 18a-26a.

The motion court's conclusory statement that petitioner entered into an open court agreement with respondent Adler, at minimum, raised another triable issue of fact as to whether or not the petitioner entered into an open court agreement with the petitioner. The fact is not affirmatively shown in the record.

Moreover, open court stipulations or agreements exists only where there is no subscribed writing or other record to evidence the agreement.[2] The motion court ignored the evidence implicating the participating attorneys improperly moving without the petitioners consent at App. 45a-48a.

"Where triable issues of fact are raised by conflicting affidavits, the court errs in making factual determinations to support its action in either dismissing the action or granting summary judgment."[3] It is improper for justice Ruchelsman to embellish the record with facts that are not within his personal knowledge.

The dismissal denied the petitioner the opportunity to raise his issues before a jury to determine whether or/not the alleged conduct among the participating attorneys constituted fraud collusion and/or deceit. Accordingly, the courts dismissal violated the V, VII and XIV Amendments to the Constitution.

The grant of summary judgment denied the petitioner the opportunity to examine the participating attorneys before a jury wherein examination of one of the parties would likely implicate the other; notwithstanding existing, probative evidence before the court. The grant of summary judgment violated the V, VII and XIV Amendments to the Constitution. The petitioner raised those issues within the complaint, before the appellate division and with the Court of Appeals in the motion for reargument (omitted here).

REASONS FOR GRANTING THE WRIT

A. Decision Conflicts with Other Appellate Decisions and United States Court of Appeal Decisions

The decision before the Court not only conflicts with decisions of other appellate divisions and United States

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[2] (6 Weinstein-Korn-Miller, NY Civ Prac ¶2104.03

[3] (6B Carmody-Wait 2d 39:117)

court of appeals but also conflicts with the very citations used to support the decision.

The decisions below determined the petitioner's complaint was barred by the doctrine of res judicata when the three (3) requisite elements of res judicata were not present. In another aspect the lower courts failed to apply the full and fair opportunity test before invoking the doctrine of collateral estoppel.

A dismissal of an earlier action on some lesser ground ordinarily does not get res judicata treatment.[4] Examples of this would include dismissal for lack of prosecution, or voluntary discontinuance. The discontinuance in the prior action regarding the application to revoke the letters of administration to the public administrator does not get res judicata treatment. The petitioner advanced that argument on both the Supreme Court and Appellate levels on the ground that the merits of the issues were never judicially decided.

The decision before the Court conflicts with the Supreme Court of Oneida County in January 2004 in the case Kulpa v Jackson (773 N.Y.S.2d 235) which applied the CPLR § 3217(c) ruling in one aspect of that case. The Oneida County held that § 3217(c) governs the res judicata effect of a discontinuance. "The general rule is that unless the discontinuance itself states otherwise, whether the notice, stipulation, or order, it is not res judicata so as to bar a new action. The court can specify, for example, that no later action may be brought by on the claim, result that invokes the res judicata doctrine. So does the shorthand phrase

[4] (Siegel, NY Prac § 442 at 715 and § 446 at 720 [3d ed])

'with prejudice'. 'Whatever phrase is used should make clear the court's intent.'

Therefore, the order issued by the Surrogate, submitted on the record at App. 40a, does not get res judicata treatment. The order is devoid of any such limiting language and; accordingly, the petitioner is not barred by the doctrine of res judicata in the instant action.

Kaufman v Eli Lilly and Co. 492 N.Y.S.2d 584 (Ct. App. 1985), a similar case involving a stipulation and/or discontinuance, conflicts with the instant decision. There the Court of Appeals of New York determined, in part ". . . if issue has not been litigated, there is no identity of issues between the present action and the prior determination; an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place matter in issue by proper pleading or even because of a stipulation."

Accordingly, the "could have should have been litigated" aspect of the appellate division's determination is inapposite (App. 6a). That branch of the complaint relating to conduct triggering the provisions of Judiciary Law § 487 was never entertained by the lower courts as is also reflected at App. 6a.

The decision conflicts with the California Appellate Court decision in Garcia v Borelli App 180 Cal.Rptr. 768. There the court identified the three (3) elements required for the doctrine of res judicata. It also determined that just because the action involved the contents of the will as drafted, it did not seek further recovery from the estate of the Testator or from Wife. It did not seek to modify in any way the settlement or judgment entered in the probate

court proceedings. Moreover, the issues of the respondent's negligence and resulting damages were not in issue in the probate court proceedings and could not have been considered by that court.

Likewise the petitioner advanced similar arguments before Supreme Court, the Appellate Court and with the New York Court of Appeals at App. 16a-17a. The case before the Court involved the content of the Surrogate proceeding but does not seek further recovery from the estate. It does not seek to modify any way the judgment entered on the claim to validate the application for fees. The petitioner is seeking damages for the alleged misconduct and improprieties engaged by the respondents during the pendancy of two applications before the Surrogate. The issue of the respondents' misconduct and resulting damages were not in issue during the Surrogate proceeding and could not have been considered by that court.

Nor could the misstatements and improper statements made to the grievance committee could have been before or entertained by the Surrogate in 1995, since the acts were committed more than two years after the petitioner commenced the proceeding before the Surrogate's Court. (App. 50a-60a and 42a-44a)

An attorney should not be allowed to sit behind an order and continue to damage a party's rights and privileges. Each improper act constitutes a renewal of a cause of action. Accordingly, issues of accrual were overlooked.

In another aspect of res judicata—collateral estoppel—the decision conflicts with Durkin v Shea & Gould. The case from the United States Court of Appeals, Ninth Circuit indicated the court should recognize circumstances such as reason to doubt the quality, extensiveness, or fair-

ness of procedures followed in prior litigation and which may warrant an exception to the normal rules of preclusion. The parties must have had a full and fair opportunity to litigate and collateral estoppel does not apply when the party whom the earlier decision is asserted did not have a full and fair opportunity to litigate the claim or issue in the earlier case (Durkin v Shea & Gould 92 F.3d 1510). Likewise, the petitioner made similar arguments at the appellate level and before the court of appeals at App. 26a-28a.

The decision conflicts with California Appeals Court decisions. California Court of Appeals held that an attorney is not absolved of misconduct where the attorney's misconduct and/or negligence caused a court to make an erroneous adjudication of an issue (Ruffalo v Patterson 285 Cal.Rptr 647). " To hold otherwise would be to rule that where an attorney's negligence [and/or misconduct] has caused the court to make an erroneous adjudication of an issue, the fact that the court has made the adjudication absolves the attorney of all accountability and responsibility for negligence [and/or misconduct]. That cannot be and is not the rule. The doctrine of collateral estoppel does not apply.

The United States Court of Appeals, Ninth Circuit, likewise found that the issue of whether a settlement was fair and adequate is not the same issue as whether the settlement was reasonable in light of the alleged malpractice by the participating attorneys. Moreover, the fact that a party received a settlement that was fair and equitable does not necessarily mean that the party' s attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent (Durkin v Shea & Gould 92 F.3 1510). Likewise the

petitioner advanced similar arguments before the appellate division and with Court of Appeals at App. 28a-30a.

More dramatically, however, is the fact that the very citations used to support the decision were merely perfunctory ministerial indications to give the decision facial credibility. The appellate decision failed to apply any of the benchmarks—the decision is devoid of any analysis.

In both Coliseum Towers Assoc. v County of Nassau (217 AD2d 387) or Matter of Hodes v Axelrod (70 NY2d 36) it was found that the identity of issue between prior actions were not the same. An analysis was made in those cites regarding issues raised in prior actions and the current action on appeal.

The petitioner made a strong effort to advance similar arguments to the Appellate Division and with the Court of Appeals at App. 16a-17a that the SCPA 711/712, *inter alia*, violations of EPTL 11-4.7(a) regarding payments to non-creditors, and the conflict of interest engaged in by the respondents in the prior action before the Surrogate were not the same issues raised before the Supreme Court pursuant to CPLR § 213(8) and Judiciary Law § 487, *inter alia*, misrepresentations made to the petitioner and/or the Surrogate about an agreement, wholesale misrepresentations made to grievance committee regarding their role in the administration of the estate of Russell Smith.

Likewise, the court never made an attempt to reconcile their citing of Gramatan Home Investors Corp v Lopez 46 NY2d 481, 485 and CRK Constr of Suffolk v Brown & Associates 260 AD2d 530). Both those cases demonstrated that before collateral estoppel is invoked a determination of whether the party whom the doctrine is invoked had a

full and fair opportunity to litigate the prior controversy. New York Courts have adopted a full and fair opportunity test. The decision before the Court failed to apply that standard "test". The decisions are devoid any reference or analysis of the various factors which enter into the determination of whether a party had a full and fair opportunity, despite the petitioner advancing the very argument before the appellate level as well as the court of appeals that the lower court failed to apply the test when he claimed that he did not have a full and fair opportunity because of the fraud, collusion and deceit engaged in by the participating attorneys.

Not only did the petitioner produced new evidence that refuted declarations made about the value of the estate, one of the elements of the "test", the petitioner claimed his standing in the that claim was damaged as a result of the fraud, deceit and collusion engaged in by the participating attorneys. Those issues were not before the Surrogate at the time of the petition applications. (App. 26a)

The failure the New York Courts to accord the petitioner appropriate consideration entitled to, relevant under the circumstances, constitute a violation of V, VII and IV Amendments of the Constitution. The appellate raised the constitutional question before the appellate level and with the Court of Appeals at App. 26a-30a.

B. 2nd Judicial Department Fosters Predator Practices

In this case before the Court, the 2nd Judicial Department policies foster predator attorney practices by failing to address the statutory rule designed to protect the public

from unscrupulous attorneys' and/or attorney dealings. In the case before the Court the failure of the Grievance Committee to address the respondents' conduct when raised by the petitioner in 1997 allowed property held in the referenced estate to be improperly disposed of. On or about August 15, 2000 the Public Administrator's office was a party to the sale of the Quogue property which was owned by the decedent and part of the assets turned over to the Public Administrator by the co-fiduciaries. The sale was for $121,000 as is reflected at App. 61a-70a.

Be mindful, however, respondent Adler in his position statement dated September 4, 1997 indicated to the Grievance Committee property located in Quogue was ". . . passed to the heirs 'in kind,' and therefore was not part of the decedent's probate estate. No fees or commissions were taken by the Public Administrator or his counsel with regard to that property, despite the fact that a Deed and other documents transferring title were prepared for recording for the heirs." App. 56a-57a.

That transaction was illegal.

The lid is off the trash can. The circumstances are as much of an indictment of nonfeasance against the 2nd Judicial Department as it is an indictment of malfeasances on the parties who were a part of the sale.

The case before the Court is in extreme need of consideration because of others who are similarly situated who either own property within the counties of the 2nd Judicial Department or who have families with property rights or interests within those counties and/or parties similar to the petitioner, who may represent parties through business

relations. Judiciary Law § 487 is being ignored despite parties making an appropriate pleadings in complaints.

The statute states in its relevant parts:

"An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain, or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed by therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." *Judiciary Law § 487*

The Appellate court failed to see any flags of impropriety either by the Grievance Committee dropping the ball on the ethical considerations regarding the conflict or other egregious misrepresentations by the respondent App. 60a. In 2002 the Appellate division sought to defend the Surrogate errs made in 1997, claiming that the Surrogate was in the best position to make a determination found no conflict with the respondents' appointment at App. 75a.

The determination conflicts with the court's own ruling in Seeley v Seeley. Doubt as to the existence of a conflict of interest must be resolved in favor of disqualification so

as to avoid even the appearance of impropriety (Seeley v Seeley 129 A.D.2d 625, 514 N.Y.S.2d 110).

The gravest misgivings by the Appellate court is its communications to the petitioner dated October 18, 2002 at App. 71a-73a, where it is claimed the court was without authority "... for overruling or even reviewing the administrative decisions of bodies established under law, such as the Grievance Committees, or acting as an appellate court of one over decisions from trial courts, such as the Surrogate's Court." App. 72a.

So whether the Appellate court saw merit to petitioner's issues before and/or after gaining jurisdiction of the instant case, the petitioner was not likely to get a fair and/or impartial decision from the court. The record reflects here that the court affirmatively passed on the issues triggering the provisions of Judiciary Law § 487 at App. 6a. The petitioners claim, therefore, that the 2nd Judicial Department fosters predatory practices is, therefore, affirmed. The likelihood of circumstances repeating themselves are eminent unless stronger safeguards are instituted.

A final question before the Court relevant to the gross nonfeasance perfected by 2nd Judicial Department is whether the pertinent parties having knowledge of the circumstances alleged by the petitioner are in violation of the federal statute 42 USCA § 1986.

The statute reads in its relevant parts:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects

> or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented . . ." **42 USCA § 1986**

This Court has consistently upheld the basic due process issues of jurisdiction, notice and a full and fair opportunity to be heard before an unbiased and impartial court of law. This case warrants certiorari since the improper grant of summary judgment violated the V, VII and XIV Amendments to the Constitution. The petitioner raised the constitutional questions within the complaint, before the Appellate division and with the Court of Appeals as is reflected throughout Appendix E.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Clarence Harley

Clarence Harley

Dated: New York, New York
February 28, 2005

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany, on the second day of December 2004.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1031

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

Mo. No. 1031
December 2, 2004

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

DECISION

Motion for reargument of motion for leave to appeal is denied.

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany, on the twenty-first day of September 2004.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 708

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

2-10 Mo. No. 708
September 21, 2004

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

DECISION

Motion for leave to appeal &c. is denied.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

D3007 O/cf

_____AD3d_____ Submitted—March 29, 2004

HOWARD MILLER, J.P.
THOMAS A. ADAMS
SANDRA L. TOWNES
WILLIAM F. MASTRO, JJ.

2003-02005
(Index No. 50587/00)

CLARENCE HARLEY,

appellant,

v

ROBERT ADLER, ETC., et al.,

respondents.

Clarence Harley, New York, N.Y., appellant pro se.

McManus, Collura & Richter, P.C., New York, N.Y. (Anne Marie Forte and Peter McGowan of counsel), for respondents.

In an action, inter alia, to recover damages for fraud, the plaintiff appeals from an order of the Supreme Court, Kings County (Ruchelsman, J.), dated January 21, 2003, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff failed to raise a triable issue of fact in response to the defendants' prima facie showing of entitlement to judgment as a matter of law that the complaint is barred by the doctrine of res judicata (*see Matter of Hodes v Axelrod*, 80 NY2d 364; *Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485). Res judicata precludes a plaintiff from re-litigating claims which could have or should have been litigated in prior proceedings (*see CRK Contr. of Suffolk v Brown & Associates*, 260 AD2d 530; *Coliseum Towers Assocs. v County of Nassau*, 217 AD2d 387).

In light of this determination, the parties' remaining contentions need not be reached.

H. MILLER, J.P., ADAMS, TOWNES and MASTRO, JJ., concur.

May 10, 2004

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

Index No. 50587/00
January 21, 2003

CLARENCE HARLEY,

Plaintiff,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER, JONATHON [*sic*] L. MATE, GREGORY X. HESTERBERG, Indivdually [*sic*] and as Partners of HESTERBERG & KELLER, and the Law Firm of HESTERBERG & KELLER,

Defendants.

PRESENT: HON. LEON RUCHELSMAN

DECISION AND ORDER

The defendant has made a motion dismissing the case on the grounds of res judicata. The plaintiff vigorously opposes the motion. After hearing the arguments of all parties this court now makes the following determination.

Background

The Plaintiff, Clarence Harley was retained by the Estate of Russell Smith who died intestate on May 24, 1984 to perform general accounting services prior to the appointment of a Public Administrator. In August 1986 the decedent's nephews, Joseph Smith and Russell S. Smith were appointed co-administrators. In August 1993 Joseph Smith brought a proceeding to remove Russell S. Smith as co-administrator. A conference was held and defendant Robert Adler was present on behalf of the Public Administrator. The court indicated it would remove both co-administrators and appoint Adler to represent the Public Administrator instead. It was revealed at that time that Adler had briefly been involved with Russell S. Smith four years earlier concerning this case when he approached Adler concerning an earlier effort on the part of Joseph Smith to remove his [*sic*] as a fiduciary. Notwithstanding this revelation neither plaintiff nor any other party objected to the appointment of Adler and his law firm's representation of the Public Administrator.

Following the appointment of Adler, both former fiduciaries submitted accountings including Harley's fee. Adler objected to the fees requested. Following that objection, Harley raised Adler's prior dealings with Russell S. Smith and the obvious alleged conflict of interest it presented to Adler and requested that Adler be disqualified. Likewise, Joseph Smith, through an attorney also sought Adler's disqualification based upon these potential conflict of interest claims. Subsequent negotiations produced a stipulation in open court followed by an order signed by Surrogate Bloom whereby Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and

decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment.

Following that agreement the Surrogate ruled that Harley's requested fees of $24,693.75 were 'excessive and unjustified' and reduced the amount of fees to $1,500.

A few months after the award was finalized, Harley filed a grievance with the Grievance Committee of the Appellate Division Second Department on the grounds that Adler violated the rules prohibiting attorney's [*sic*] from engaging in conflict of interests since he had prior discussions with Russell S. Smith and that he had engaged in various frauds and improprieties. The Grievance Committee obtained statements from both Harley and Adler and on April 15, 1998 dismissed the complaint filed by Harley.

This lawsuit followed wherein Plaintiff alleges essentially that Adler committed fraud and deceit due to his prior discussions with Russell S. Smith which enabled Smith to fraudulently encumber Estate property.

Conclusions of Law

The doctrine of res judicata prevents future litigation between the same parties concerning the same cause or causes of action (*Hodes v. Axelrod*, 70 NY2d 364, 520 NYS2d 933 [1987]). Res judicata bars matters actually litigated as well as matters which could have been litigated (*Latham Sparrowbush Associates v. Shaker Estates Inc.*, 153 AD2d 788, 545 NYS2d 219 [3rd Dept., 1989]). The doctrine of res judicata bars all future claims arising out of the same transaction even if based on different theories or if seeking different remedies (*Brooklyn Welding Corp. v. City of New York*, 198 AD2d 189, 604 NYS2d 87 [1st Dept., 1993]).

In this case all the claims being asserted against Adler and the remaining defendants have already been addressed and rendered final by prior Surrogate Court decisions. While the Surrogate decision awarding Plaintiff his fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order. In fact the only reason such allegations were not more fully explored was because Plaintiff specifically waived those claims in open court pursuant to an agreed upon Stipulation with Adler (*see*, *Bailey v. New York City Transit Authority*, 196 AD2d 854, 602 NYS2d 177 [2d Dept., 1993]). Although not required the stipulation was endorsed by the Surrogate's Court in a written order (*Babiarz v. Gasparini*, 198 AD2d 608, 603 NYS2d 915 [3rd Dept., 1993]). The plaintiff has introduced no evidence demonstrating fraud or deceit in the entering of that stipulation itself except to cursorily declare it mere 'conjecture' and 'fraud' (*Dkystra v. Dkystra*, 211 AD2d 745, 621 NYS2d 693 [2d Dept., 1995]). However, a review of the minutes of the conference held January 19, 1995 reveals otherwise. The record reflects that Adler notified the court of a stipulation reached concerning action about his alleged improprieties which was recited in open court in great detail. Plaintiff never objected to the stipulation and failed to join Russell S. Smith who made similar accusations against Adler later during the conference. Without some objective evidence tending to show fraud or deceit or other improper behavior on the part of Adler the court is bound to accept the stipulation.

Nor is the stipulation unduly vague as to raise factual issues taking the matter outside the scope of res judicata. In *Dunleavy v. First American Title Insurance*, 117 AD2d 952, 499 NYS2d 264 [3rd Dept., 1986]), the court held that

the stipulation there was so vague and the parties were in complete disagreement as to its meaning and intent that it could not be said with any definitiveness whether the present action concerned the same issues as the prior one. The court noted the ambiguities raised issues of fact and law which precluded dismissing the action on res judicata grounds. However, no such ambiguity exists, in fact Plaintiff concedes the contents of the stipulation but insists it was the product of fraud. Plaintiff cannot substantiate those claims, on the contrary, his conduct at the hearing demonstrated he acquiesced to the stipulation. Therefore, all the claims sought here were already decided and rendered final by prior judgements of the surrogate's [*sic*] court. Thus, all of the claims raised here are barred by res judicata.

Based on the foregoing, the motion of the defendant is granted and the case is dismissed.

So ordered.

ENTER

DATED: January 21, 2003
Brooklyn N.Y.

/s/ LEON RUCHELSMAN
Hon. Leon Ruchelsman
JSC

APPENDIX E

EXCERPT OF NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, STATE OF NEW YORK

22NYCRR § 500.11(d)(1)(ii) Questions Presented for Review

Whether a party may commence a suit challenging a stipulation for reasons that would invalidate a contract where the action has terminated?

Whether the Appellate Division failure to find that the lower court, in exercising discretion, failed to accord the appellant consideration entitled on the complaint on appeal?

Whether an attorney, who has caused a court to make an erroneous adjudication of an issue, that the court has made that adjudication, absolves the attorney of any misconduct, accountability and responsibility?

Whether material misrepresentations made by an attorney triggers the statutory provisions of Judiciary Law § 487?

22NYCRR § 500.11(d)(1)(iii) Procedural History

Timeliness Chain

On June 8, 2004, Plaintiff-Appellant served, by mail, the Appellate Division, Second Department's May 10, 2004 decision/order (Exhibit A) on the Defendant-Respondents.

Procedural History

The appellant commenced this action in [*sic*] December 29, 2000 by service of a Summons with Notice. Issue was thereafter joined. By court order of the Supreme Court the appellant was required to file the Note of Issue by October 31, 2002. Subsequent to filing the note of issue the respondents moved for summary judgment motion. During the pendancy of that motion the respondents moved the court to vacate the Note of Issue.

The motion to vacate the Note of Issue was granted during the pendancy of summary judgment by Justice Rivera while the summary judgment motion was heard by Justice Rushelsman. The appellant filed an Appeal and the Appellate Division affirmed the lower court's decision. Dismissing the complaint on the grounds of res judicata.

22NYCRR § 500.11(d)(1)(iv)
Jurisdiction

The Court has jurisdiction, pursuant to CPLR §5602(a)(1)(i), in a proceeding originating in the Supreme Court from an order/decision of the Appellate Division which finally determines the proceeding and which is not appealable as of right.

22NYCRR § 500.11(d)(v)
Why the Questions Presented Merits Review

This case merits review since affirmation by the 2nd Department involves conflict with prior decisions of this Court. This case presents a situation wherein the 2nd Department affirmed the lower court's decision concluding the appellant failed to raise a triable issue of fact in response to the defendants' prima facie showing of entitle-

ment to judgment as a matter of law the complaint is barred by the doctrine of res judicata.

The affirmance applied the doctrine of res judicata where issues were never raised in a prior action and/or the prior action was never adjudicated on the merits. In another aspect the application was inappropriate and/or exceptions to the application were present. Moreover, in applying the principle the lower court failed to take into account evidence and/or afford the appellant some factor entitled to consideration. The case presents novel issues where an attorney is liable to a third party during a court proceeding.

The appellant was engaged by co-fiduciaries Joseph Smith and Russell S. Smith by contract to provide necessary accounting services for the disposition of the estate of their deceased uncle Russell Smith. During the administration one co-fiduciary Russell S. Smith engaged in misconduct encumbering estate assets without the knowledge of the other. The co-fiduciaries were ultimately removed and Samuel Plotkin, Public Administrator, Kings County, was installed in 1993 and the respondents were appointed as legal counsel on about January 27, 1994. The Public Administrator had been advised on several occasions that respondent Robert Adler had appeared in the same referenced estate representing for Russell S. Smith. The Public Administrator failed to move on the knowledge of the potential conflict. Thereafter, the respondents, on behalf of the administrator, commenced to systematically obscure and/or illegal acts and other misconduct of his former client. After several administrative sessions where Joseph Smith refused to consent to a novation permitting the estate to pay personal debts of Russell S. Smith, respondent Robert Adler declared that he, on behalf of the public

administrator, would pay over $72,000 of loans entered into by Russell S. Smith where he failed to disclose his fiduciary capacity. The appellant dispensed an SCPA § 719(10) notification dated July 21, 1994 bringing to the attention of the court mismanagement and misapplication of estate assets.

Through his attorney the appellant filed a formal petition application on or about November 24, 1994 seeking the removal of Samuel Plotkin, Public Administrator, after the court failed to move on the initial SCPA § 719(10) notification. On November 30, 1994, the appellant along with his attorney, Valerie Hawkins, attended a pre-discovery meeting related to a contested accounting proceeding commenced by the Public Administrator. Respondent Robert Adler, Gary Mund, court attorney, and counsel for prior co-fiduciary Russell S. Smith were in attendance. Respondent Robert Adler submitted an offer for the appellant to withdraw his application to revoke the public administrator in return the public administrator would not oppose and/or withdraw objections to the appellant's application to validate his fees. The appellant had no incentive to bargain with the respondent since his contract obligations with the estate were supported and documented with an affidavit of service already filed with the court; therefore, the circumstances were not quid pro quo. The appellant declined and instructed his attorney by letter dated December 2, 1994 accordingly [App 35a-36a]. However, the participating attorneys having other objectives and purposes and having the will, means and the wherewithal, engaged in collusion to defraud the appellant of his pending rights in the court. The appellant was ultimately damaged. The instant complaint on appeal was commenced December 29, 2000, pursuant to CPLR 213(8) and Judiciary Law § 487.

In its primary aspect the doctrine of res judicata operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. The elements of res judicata are:

(1) the identical issue is under consideration

(2) a final judgment was reached on the merits in the earlier adjudication;

(3) the part against whom that judgment is now asserted was a party or in privity with a party in the prior action

The relief sought in the prior action was the removal or suspension of Samuel Plotkin, Public Administrator. The issues raised and/or facts to be proved were whether the *Public Administrator, through his attorneys, was engaged in conduct adverse to the interest of the estate* namely, but not limited to, treating over $72,000 of loans entered into by Russell S. Smith, as priority liabilities of the estate, where he failed to disclose his representative capacity as fiduciary and failed to disclose the estate; improperly obscuring and/or concealing improper and illegal acts committed by the same co-fiduciary, in light of, Surrogate's decree that Russell S. Smith was ineligible to act as a fiduciary at the time of his appointment (Exhibit C–Decree); failing to determine whether Russell S. Smith improperly masqueraded as the decedent encumbering estate assets, failing to defend the estate against improper creditors, and; finally failing to remove the respondents as legal counsel once it was affirmatively shown that they represented Russell S. Smith in a prior action in the same referenced estate. The appropriate rules and laws applicable were namely, but not limited to, SCPA 711, ETPL [*sic*]

11-4.7(a) and procedural and customary rules of New York regarding attorney disqualification (*Seely v Seely 129 A.D.2d 625, 514 N.Y.S.2d 110*). Respondent Robert Adler summarizes the relevant issues in the prior action to remove the public administrator in his position statement dated September 4, 1997 provided to the grievance committee prior to the commencement of this lawsuit at item App 50a; item App 54a #22 at pages 4-5 and Part II at App 59a.

The relief sought in the current case is pecuniary remuneration for damages caused by the false inducement and/or false representation. The issues to be raised and/or facts to be proved are whether there was a bona fide agreement with pertinent parties; whether the appellant's attorney, the respondents and/or other parties agreed, by word or deed, to defraud the appellant. The relevant law and/or statutory rules applicable on appeal are CPLR 213(8) and Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Accordingly, the differences which exist between the issues raised in the prior action and those raised now, namely, the differences in the kind of relief, the kind of facts to be proved, and the kind of law to be applied, outweigh the similarities such that the doctrine of res judicata is inapplicable (*Coliseum Towers Assoc. v County of Nassau, 217 AD2d 387*).

Instant Action Contesting Stipulation not Barred

The essence of the complaint on appeal is whether the appellant can contest a purported stipulation raised by the respondents reduced to order dismissing an action to revoke the letters of administration issued to the Public Administrator in a prior court action (Exhibit C). The appellant's allegation that the stipulation was the product of fraud and collusion engaged in by the participating attorneys and was not an issue considered by the Surrogate. While the respondents, as the moving party for summary judgment, totally evade the issue claiming that the allegations of professional misconduct of fraud, deceit and collusion revolved around the respondent Robert Adler's purported conflict of interest due his prior dealings with Russell S. Smith and that any claim for of fraud, deceit and collusion should have been raised in the Surrogate's Court action and were raised in those proceedings. As outlined above the instant complaint on appeal is about the respondents falsely inducing appellant and falsely representing to the appellant and/or the Surrogate that an agreement was entered into withdrawing the application to revoke the Public Administrator. As a matter of fact, the lower court correctly found that allegations in the complaint were not before the court but immediately reversed itself, indicating, ". . . the Surrogate decision awarding Plaintiff fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order. Nonetheless, the germane issue is whether the appellant may institute a new action contesting the stipulation on the record. The Court of Appeals held in Yonkers Fur Dressing Co v Royal Ins. Co[1] that an agreement:

[1] 247 N.Y. at 444, 160 N.E. at 781

> "that the above entitled litigation is settled and terminated . . . is not a mere arrangement between counsel made during the pendency of the case from which a party might be relieved when both parties could be restored substantially to their former position in court and when it would be inequitable to hold the parties to it . . . The compromise was wholly foreign and extrinsic to the litigation and to any action by the court."

The settlement, the Court continued, created a new liability; it could be upset in an independent suit for reason that would undo a contract, such as fraud and over-reaching but not in the discretion of the court by motion once the suit was settled. Accordingly, the instant appeal raising allegations of fraud collusion and/or deceit is not barred by res judicata. Accordingly, where the record reflects that the appellant was negligently represented by his attorney, namely but not limited to, allowing the respondents to use her letter dated December 5, 1994 to falsely induce the appellant into thinking that his application was withdrawn [App 45a], coupled with the her failure to attend the hearing and misdirecting her misconduct by fax dated January 17, 1994 and; thereafter, by letter dated December 5, 1997 affirming that she did not enter into an agreement and/or proof that she engaged in collusion with the respondents [App 38a], constitute reasons that would invalidate a contract is a triable issue of fact; or the respondents falsely representing to the Surrogate that an agreement was entered into with appellant's attorney and/or 'unspecified' parties withdrawing petition application to revoke the Public Administrator when that was untrue, constitute reasons that would invalidate a contract; or the respondent claim-

ing during the hearing "Mr. Harley absolutely, your Honor, has no right, not only to make that statement, but Mr. Harley has no interest in this proceeding. He is proceeding improperly, he has a claim. . ." constitute overreaching and; the appellant, as an interested party, entitled to file his application, fined a sum of $10, 000 [*sic*] by the Surrogate for raising his issues in his petition constitutes duress or overreaching by the court (Transcript 24-25); and whether the forgoing jointly or individually constitute fraud, collusion or deceit or duress and/or over-reaching sufficient to invalidate a contract is a triable issue of fact for a jury to decide. The failure of the lower court to find the adequacy of the record in support of a fact pattern of fraud and collusion regarding whether the respondents falsely induced and/or falsely represented to the appellant and/or the Surrogate an agreement with appellant's attorney and/or other 'unspecified' parties withdrawing the appellant's application to revoke the public administrator turns an issue of fact into a reviewable question of law for the Court of Appeals.

Record Impeaches Issue on Agreement—
Open Court or Otherwise

The respondents were effectively impeached on the record on the position that there was an agreement with the appellant's attorney. On summary judgment motion respondent Robert Adler claimed, "During a conference, Hawkins and I reached an agreement whereby the Public Administrator would not oppose Harley's petition and allow Harley to submit his claim on the merits and abide by any decision by the Court. In return, Harley would withdraw his petition seeking the revocation. Annexed

Exhibit H is a copy of Hawkins letter [dated December 5, 1994] setting forth terms of the agreement."[2] The relevant sections of that letter are as follows:

Valerie Hawkins

> *This letter will confirm the agreement reached by Mr. Adler, as representative for the Public Administrator in this action and the undersigned [Valerie Hawkins] as representative for Clarence J. Harley, that the Public Administrator will not oppose the verified petition of Mr. Harley, to validate his claim against the Estate of Russell Smith on condition that Mr. Harley withdraws his petition seeking the revocation of the letters of administration issued to the Public Administrator."* (Exhibit D Respondent's position statement dated November 20, 1997—reference attachment Valerie Hawkins letter)[3]

The complaint had already established that the appellant's attorney did not have authority to settle the action by letter dated December 2, 1994 [App 35a-36a]; accordingly, Hawkins affirmatively violated the appellant's instructions when she issued her December 5, 1994 [App 45a] letter to the respondents. An attorney may not settle or compromise his client's case in absence of consent by client (*Silver v Parkdale Bake Shop, Inc. 8 AD2d 607, 184 N.Y.S.2d 714*). In opposition to summary judgment the appellant submitted Hawkins' letter dated December 5, 1997 where she

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[2] ¶ 17 Affidavit in Support of Defendants' Motion for Summary Judgment.

[3] Note that the Appellant was not carbon copied on the letter.

refutes respondent's position declaring, ". . . the agreement of the parties was never filed with the court or otherwise formalized . . ." [App 38a-39a]. Accordingly, there was no valid agreement between the attorneys. The respondents were further impeached during a grievance action commenced by the appellant 2 1/2 years later. There the respondent indicated that he entered into a stipulation of counsel with Valerie Hawkins to dispose of the appellant's petition (Exhibit E, item #25, pg 5). Requirements of CPLR 2104 were not met. The appellant is only in possession of his attorney's December 5, 1994 letter and the respondents December 12, 1994 letter by dint [*sic*] of discovery efforts through the Grievance Committee prior to the commencement of the instant complaint on appeal. Noteworthy, is the fact that the Grievance Committee never compelled the respondents to reconcile the egregious misrepresentation that were affirmatively disputed during those proceedings.

The lower court, however, jumped the track on the issue of an agreement between the two attorneys. The lower court determined that the *appellant* entered into an "open court" agreement with the respondents. Incredibly a position never promoted by the respondents. The lower court's finding that ". . . negotiations produced a stipulation in open court followed by an order signed by Surrogate Bloom whereby Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment . . ." is directly contradicted by record since the respondent recited the following into the record:

Robert Adler

> *"The parties have agreed as follows: That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim. The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to remove the Public Administrator."* (Annexed Transcript, pgs 4-5)

The Public Administrator's appointment and his objections were at issue—not the respondents' objections and/or appointment.

Moreover, the record is devoid of any colloquy directed by the court with the appellant as to whether he agreed with respondents statements entered into the court record.

The facts and evidence presented out weigh [*sic*] any determination that there was ever a valid agreement—open court or otherwise. The fact that the Surrogate made an erroneous adjudication of an issue should not absolve the respondents of responsibility and accountability. To hold other wise [*sic*] would be to rule that where an attorney's misconduct has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of responsibility and accountability for the misconduct. However, the circumstances trigger the provisions of Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition

to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

The failure of the lower court to find the adequacy of the record in support of a fact pattern of fraud and collusion regarding whether the respondents falsely induced and/or falsely represented to the appellant and/or the Surrogate of an agreement withdrawing the appellant's application turns an issue of fact into a reviewable question of law for the Court of Appeals.

Decision Lacks Fidility [*sic*] to Record on Appeal

Finally, the above discussion about whose appointment was being revoked and whose objections were being withdrawn and/or with whom raises a serious question as to the decisions fidelity to the record on appeal. The appellant finds a series of determinations raised in the decision that need close scrutiny by the Court. Therefore, the appellant lists the following facially flawed determinations extracted from the decision which are not reflected in the record on appeal:

> (1) ". . . Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment." [App 8a-9a]
>
> (2) "This lawsuit . . . alleges essentially that Adler committed fraud and deceit due to his prior discussions with Russell S. Smith which enabled Smith to fraudulently encumber Estate property." [App 9a]

(3) "... the Surrogate decision awarding Plaintiff his fee makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order." [App 10a]

(4) "... record reflects that Adler notified the court of a stipulation reached concerning action about his alleged improprieties which was recited in open court in great detail." [App 10a]

(5) Plaintiff never objected to the stipulation and failed to join [Joseph] Smith who made similar accusations against Adler ..." [App 10a]

The transcript of the hearing being the key source, submitted here on motion, contradicts items (1) and (5) above referenced at pages 4-6; and 8-10 and 24, respectively of the Annexed Transcript. The transcript is devoid of items (3) and (4) since there was never a court session where the Surrogate considered the issue of whether the respondents falsely induced and/or falsely represented to the appellant an agreement was entered into withdrawing the petition to revoke the public administrator and; while the "alleged improprieties" is a nebulous term shrouded in mystery, the transcript does not reflect any "stipulation reached concerning" respondent Robert Adler's discourse regarding the genesis of his prior representation of Russell S. Smith. Finally, item (2) above is facially false since the complaint on appeal is about the respondents false inducement and/or false representation to the appellant and/or the Surrogate that an agreement was entered into with appellant's attorney and/or other 'unspecified parties withdrawing the appellant's application to revoke the public administrator, thereby, causing the Surrogate to issue an erroneous order.

Appellant Deprived of Consideration Entitled

Res Judicata in its second aspect comes into play in situations involving a second suit, not necessarily between the same parties, which is based on a different cause of action. Alternatively labeled collateral estoppel or claim preclusion it is conclusive as to issues in the second action as were actually litigated and determined in the first action. However before collateral estoppel is evoked it must be shown that the party against whom collateral estoppel is sought had been afforded a full and fair opportunity to contest the decision said to be determinative. The appellant alleged that the participating attorneys barred him from responding to a court extension, communicated false declarations to the court about the value of the estate and extent of services provided by the appellant which caused the Surrogate to adjudicate an erroneous decision on fees earned and reimbursements due the appellant. In opposition to summary judgment, the appellant alleged that any judgment or order referring to a "stipulation of the parties" was tainted with fraud of which denied the appellant a full and fair opportunity to defend his claim. New York has adopted the full and fair opportunity test in applying the doctrine of collateral estoppel. Factors which should enter into the determination whether party has had a full and fair opportunity to litigate his/her claim include extent of litigation, availability of new evidence, competence and experience of counsel, etc., etc. (*Schwartz v Public Administrator of Co. of Bronx 24 N.Y.2d 65, 298 N.Y.S.2d 955*).

The lower court failed to apply the full and fair opportunity test entitled to consideration by the appellant opposing summary judgment motion.

Consequently, the failure of the lower court to afford the appellant consideration entitled poses a question of law reviewable by the Court of Appeals. Accordingly, the appellant presents a list of factors, not to be deemed complete, to be considered on the issue reflective in the record:

> Whether Valerie Hawkins' failure to appear at the hearing January 18, 1995, coupled with her December 5, 1994 letter [App 45a] aided the respondents inducement and/or impression upon the appellant that his petition had been withdrawn barred the appellant from having a full and fair opportunity to litigate his rights and claims and,
>
> Whether the respondents' false representation about an agreement deceived the Surrogate barred the appellant from having a full and fair opportunity to litigate his rights and claim; and
>
> Whether Valerie Hawkins countermanding the appellant's instructions vis-à-vis her December 5, 1997 letter [App 38a-39a] claiming that her agreement with the respondents was never filed with the court or otherwise formalized and that she was not able to assist the appellant on an agreement she authored barred the appellant from having a full and fair opportunity to litigate his right [*sic*] and claims; and,
>
> Whether the forgoing circumstances individually or jointly constitute fraud, collusion and/or deceit barred the appellant from having a full and fair opportunity to litigate his rights and claims;

Whether, commingling the appellant's petition(s) within the contested accounting proceeding and without counsel, barred the appellant from having a full and fair opportunity to litigate his rights and claims; and

Whether Surrogate's err on the issue of disqualification of the respondents (Seely v Seely 129 A.D.2d 625, 514 N.Y.S.2d 110) barred the appellant from having a full and fair opportunity to litigate his rights and claims; and

Whether the Surrogate was improperly briefed by the participating attorneys of the value of the estate being less [*sic*] $100,000 (Exhibit C) and/or improperly briefed regarding services rendered by the appellant barred the appellant from having a full and fair opportunity to litigate his rights and claims;

Whether the forgoing [*sic*] circumstances individually or jointly constitute fraud, deceit and/or collusion barred the appellant from having a full and fair opportunity to litigate his rights and claims.

New evidence submitted on the record and on appeal refutes material declarations communicated in the decision to the validate appellant's fees and reimbursements (Exhibit E). Excerpts from NYS Estate tax return (TT-385) reflects that at the date of death the gross value of estate, comprising real property, cash and cash equivalents, was upward of $115,000; notwithstanding the administrator liquidated the estate for more than $135,000 despite the fact that real property potentially valued at $400,000 was

not liquidated by the public administrator; while copies of tax returns, tax discharge and release of lien substantiating appellant's affidavit of services submitted to the court along with appellant's SCPA § 719(10) notification and another affidavit of services submitted through his attorney contradicts the determinations used to buttress the Surrogate [*sic*] decision to validate fees and reimbursement. Whether the discrepancies were intentional or constituted a scheme by the participating attorneys to defraud the appellant should be submitted to a jury trial where all facts could be developed. The appellant is of the opinion that the court's decision would have been different if the respondents had not made false representations about an agreement/stipulation and/or undervalued the estate, made unverified and sham objections about appellant's services causing the Surrogate to issue an erroneous order. The decision issued by the Surrogate regarding the appellant's fee referencing "stipulation of the parties" is tainted with fraud. The fact that the Surrogate made an erroneous adjudication of an issue should not absolve the respondents of responsibility and accountability. To hold other wise [*sic*] would be to rule that where an attorney's misconduct has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of responsibility and accountability for the misconduct. That is not the rule and the doctrine of collateral estoppel does not apply. However, the circumstances trigger the provisions of Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to

the party injured treble damages, to be recovered in a civil action.

Moreover, the issue as to whether the fees awarded the appellant was fair and adequate is not the same issue as whether the fees were fair and adequate in light of the fraud, collusion and/or deceit engaged in by the participating attorneys. The fact that the appellant received a fee does not mean necessarily that the fee was fair or equitable or that the appellant's attorney was competent or that fraud, collusion or deceit did not occur or that the appellant would have received a more favorable fee had the appellant's attorney been more competent or that fraud, collusion and/or deceit had not been engaged in by the participating attorneys.

Accordingly, the application of res judicata in its second aspect was improperly applied in this case on appeal.

The 2nd Department past on factors raised on appeal triggering the provision of Judiciary Law § 487.

NEW YORK SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

Appellate Division Docket No. 2003-02005

CLARENCE HARLEY,

Plaintiff-Appellant,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Defendant[sic]-Respondents.

ORDER WITH NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Appellate Division, Second Department, duly entered in the office of the Clerk May 10, 2004.

Dated: New York
June 8, 2004

/s/ CLARENCE HARLEY
Clarence Harley
Plaintiff-Appellant
424 Park Ave South #111
New York, NY 10016
(212) 479-7375

To: McManus, Collura & Richter, PC
Attorney for the Defendant-Respondents
48 Wall Street – 25th Floor
New York, NY 10005
(212) 425-3100

Pages 33a to 34a have been intentionally left blank

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EXHIBIT B

Letter dated December 2, 1994

[LETTERHEAD]

CLARENCE J. HARLEY
Public Accountant

December 2, 1994

Valarie [*sic*] A Hawkins, Esq.
172 Fulton Avenue
Suite 306
Hempstead, NY 11550

Re: Estate of Russell Smith
PA File # 20214
Court File # 3219/85

Dear Ms. Hawkins:

Once again I have sat and observed Robert Adler denigrate my professionalism as well as impugn my character as a way of deflecting his improprieties. He has been remiss in his duties in that he has not, after having knowledge of for over a year, secured the Quogue property from the Suffolk County redemption unit by paying the current taxes due. There also seems to be an issue with respect to the value of the property. This property was earlier appraised at $40,000 at the date of death. It seems inconceivable that the property would not have been appreciated in value over the last 10 years, especially given the location of the property. In addition, Robert Adler made no

mention of attempts to the recover the $10,000 certificate of deposit held by the Greater New York Bank for Savings, to further show the disdain that this gentleman has held for this case. This note in and of itself would have accrued to a substantial amount over the years.

The above matters are disclosed in Joseph Smith's accounting in which Robert Adler evidently does not care to utilize since it does not coincide with his views and precepts of how this estate should be managed. I cannot see myself getting any reasonable compensation for my services with Robert Adler at the helm of this estate. Especially on the heels of some weak promise that does not remotely suggest that I will be compensated. It is just not a quid pro quo situation. I stand a better chance with some other unbiased representative in place.

Ms. Hawkins, I have been involved in this matter for over six years, another six months will not make much difference at this point. I have considered the matter; and I stand fast on my petition proceedings and will not withdraw any part thereof.

Respectfully yours,

/s/ CLARENCE J. HARLEY
Clarence J. Harley

• 98 Fort Greene Place, Brooklyn, New York 11217 •
(718) 852-0707 •

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

January 17, 1995

VIA FAXIMILIE [*sic*]

Robert Adler, Esq.
Hesterberg & Keller
32 Court Street
Brooklyn, New York 11201

Re: Estate of Russell Smith
King's [*sic*] County Surrogate's
Court File No. 3219/85

Dear Mr. Adler:

This letter will serve to confirm our conversation earlier today in which I informed you that I will not be able to appear at the trial of the above referenced proceeding tomorrow because I will be actually engaged in a criminal proceeding before the District Court, Nassau County.

This letter will further confirm that I have not been able to respond to your letter dated December 2, 1994, because I have not been in contact with Clarence Harley since said date; my calls and correspondence to him have not been answered.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:ms
cc: Mr. Clarence Harley
Bryan Gordon, Esq.

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

December 5, 1997

Via Facsimile

Mr. Clarence J. Harley
5 Beekman Street, Suite 606
New York, New York 10038

Dear Mr. Harley:

I am in receipt of your correspondence forwarded to this office via facsimile on December 2, 1997. Quite frankly, you do need to say more to substantiate your suggestion of malpractice and a legitimate grievance.

My records reflect that I appeared with you on November 30, 1994 in the Kings County Surrogates' Court for a conference. The December 5, 1994 letter that I wrote to Mr. Adler confirms the agreement reached by the parties at said conference; namely, that Mr. Adler's office would not oppose your petition for accounting fees and you would withdraw your petition to have Mr. Adler's office removed as the fiduciary for the Estate of Russell Smith. This does not amount to malpractice. The agreement was not harmful to your interests.

You had every right to change your mind about the agreement since the agreement of the parties was never filed with the court or otherwise formalized. However, this office was not able to act on your behalf with respect to this agreement or any other matter.

This office stopped representing you in January 1995 because: You repeatedly tendered bad checks to this office;

you failed and refused to pay any portion of the modest fee that this office charged you for its services in this matter; and you failed and refused to respond to our correspondence to you. We received absolutely no correspondence from you from December 1994 until November 1997. Thus, it became your sole responsibility to protect your interest with respect to the aforementioned agreement and any other matter in the Estate of Russell Smith.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:lbw

EXHIBIT C

Decision of Surrogate's Court
of the
State of New York County of Kings

FILE NO. 3219-85

In the Matter of the Application of
CLARENCE J. HARLEY, Petitioner,
for a decree revoking the Letters of Administration
of SAMMUEL PLOTKIN, Public Administrator,
Pursuant to SCPA § 712,
THE ESTATE OF RUSSELL SMITH,

Deceased.

B L O O M, S.

DECISION

Pursuant to the stipulation of the parties, the application to revoke letters is dismissed.

This decision constitutes the order of the court.

/s/ BERNARD M. BLOOM
BERNARD M. BLOOM
S U R R O G A T E

Dated. Brooklyn, New York
November 2nd, 1995.

EXHIBIT D

Letter dated November 20, 1997 with enclosures

[LETTERHEAD] HESTERBERG & KELLER
Counsellors at Law
32 Court Street
Brooklyn, New York 11201-4404

(718) 875-7450

ALEXANDER G. HESTERBERG (1911-1981)
DAVID KELLER (1927-1990)
ROBERT ADLER*
JONATHAN L. MATE*Δ
GREGORY X. HESTERBERG

* NEW YORK AND NEW JERSEY BARS
Δ FLORIDA BAR

170 OLD COUNTRY ROAD*
MINEOLA, NEW YORK 11501
(516) 222-0002

252 KINDERKAMACK ROAD
ORADELL, NEW JERSEY 07649
(201) 592-0269

3301 SOUTH OCEAN BOULEVARD*
BOCA RATON, FLORIDA 33487

* BY APPOINTMENT ONLY

November 20, 1997

BY HAND DELIVERY

State of New York
Grievance Committee for the Second and
Eleventh Judicial Districts
Municipal Building – 12th floor
210 Joralemon Street
Brooklyn, New York 11201
Attn: Mark F. DeWan, Esq.

Re: Complaint of Clarence Harley
Docket No. K-2099-96

Dear Mr. DeWan:

I have your letter of November 13, 1997.

In response thereto, I am enclosing a letter dated December 5, 1996 signed by Valerie A. Hawkins, Esq., wherein she memorialized the agreement reached in Surrogate's Court, Kings County, on November 30, 1994 held before a Court Attorney/Referee that, in consideration of the Public Administrator not opposing Mr. Harley's request for fees, he would withdraw his Petition seeking the revocation of Letters of Administration issued to the Public Administrator.

It is my recollection that there was never any question but that the Court would not grant the relief requested by Mr. Harley insofar as he wanted the Public Administrator to be removed as Administrator. The Public Administrator's Accounting was before the Court and the Court simply wanted to resolve all of the Objections filed to the three Accountings, namely, the Accountings filed by the

Public Administrator, Joseph Smith and Russell Smith. Further, it wanted to resolve the issue of Mr. Harley's claim for services.

Removing the Public Administrator for the purpose of having another administrator appointed, which would require another accounting in another proceeding which would only delay the ultimate decisions of the Court, was not something the Court was willing to consider.

I have searched the Court record and the records of the Public Administrator and cannot find any letter of mine to Ms. Hawkins dated December 2, 1994. However, I am enclosing a copy of my letter to her dated December 12, 1994. Perhaps she was referring to this letter and it was merely a typographical error contained in her January 19, 1995 Letter.

In any event, throughout the negotiations to resolve all of the contested issues, there was never any time subsequent to December 1994 wherein the issue raised in Mr. Harley's Petition to remove the Public Administrator was ever discussed. It was also, in my opinion, understood that this proceeding was withdrawn upon condition that the Public Administrator would not object to Mr. Harley's application for fees.

A review of the entire Court record and the records of the Public Administrator shows that the Public Administrator fulfilled its obligation and did not file any opposition to the claim filed by Mr. Harley for fees and simply agreed to abide by any Court decision.

As previously indicated to you, the estate was sufficiently solvent to pay any fee awarded Mr. Harley, even if the Court determined that his fee should be paid in full. Therefore, I cannot understand what the basis of Mr.

Harley's objections are regarding my firm and, more particularly, my actions with regard to his claim. The actions I took and the actions of my firm in no way prevented Mr. Harley from receiving any fee that the Court would award.

I am enclosing, once again for your records, copies of two decisions of the Court dated November 2, 1995 and November 19, 1995, which, once again, refer to the "stipulation" of the parties concerning the application of Mr. Harley to remove the Public Administrator and the determination of his claim. As indicated, it is obvious that the Court too relied upon the agreement reached by Mr. Harley's attorney, my office and all other attorneys involved that the contested accounting proceedings would proceed toward a trial and Mr. Harley would be given every opportunity to establish his claim without opposition.

I hope this finally concludes this matter.

Thank you.

Very truly yours,

/s/ ROBERT ADLER
ROBERT ADLER

RA/bb

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

December 5, 1994

Robert Adler, Esq.
Hesterberg & Keller
32 Court Street
Brooklyn, New York 11201

Re: Estate of Russell Smith

Dear Mr. Adler:

As a follow-up to the conference held at the Surrogate's Court on November 30, 1994 in reference to the above captioned matter, enclosed you will find copies of the two verified petitions submitted to the Court by my client Clarence J. Harley on or about November 18, 1994.

This letter will confirm the agreement reached by Mr. Adler, as representative for the Public Administrator in this action and the undersigned as representative for Clarence J. Harley, that the Public Administrator will not oppose the verified petition of Mr. Harley, to validate his claim against the Estate of Russell Smith on condition that Mr. Harley withdraws his petition seeking the revocation of the letters of administration issued to the Public Administrator.

If you have any questions regarding Mr.Harley's position, please do not hesitate to contact the undersigned.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:lbw
Enclosure
cc: Bryan Gordon, Esq.

[LETTERHEAD]

[STAMPED ABOVE SEAL: OFFICE COPY]

HESTERBERG & KELLER
COUNSEL
32 COURT ST., BROOKLYN, N.Y. 11201
TELEPHONE: (718) 875-7450

SAMUEL PLOTKIN
PUBLIC ADMINISTRATOR

OFFICE OF
PUBLIC ADMINISTRATOR OF KINGS COUNTY

December 12, 1994

BY FACSIMILE & REGULAR MAIL

Valerie A. Hawkins, Esq.
175 Fulton Avenue, Suite 306
Hempstead, New York 11550

Re: Estate of Russell Smith
PA File No. 20214

Dear Ms. Hawkins:

Thank you for your letter of December 5, 1994 and the enclosures contained therein.

As discussed with you on Friday, December 9, 1994, it might be best if you could confirm with the Accounting Department if either of the two Petitions have been entertained. Naturally, if they have not been entertained, you can pick up the Petition with regard to the removal of the Public Administrator and save the filing fee.

I suggest that, if both Petitions have not been entertained, you may wish to discuss with Mr. Harley if he wishes to pick up the second Petition with the understanding that his fee would be decided in the contested account-

ing proceeding now already before the Court for which there is a current trial date.

If both Petitions have been entertained, then I will expect that you will formally, in writing, withdraw the Petitioner to remove the Public Administrator.

With regard to the second Petition, if it is entertained, this will confirm that I will simply submit an affidavit to the Court on behalf of the Public Administrator advising them that we have no objection to Mr. Harley's claim being determined pursuant to his affidavit of services to be submitted.

I will await your further advice with regard to whether the Petitions have been entertained. If I can be of any further help, please contact me.

Very truly yours,

HESTERBERG & KELLER

By: /s/ _____
Robert Adler

RA/bb

PLEASE ADDRESS REPLY TO
HESTERBERG & KELLER, 32 COURT ST.,
BROOKLYN, NEW YORK 11201-4404

EXHIBIT E

Letter dated September 4, 1997

[LETTERHEAD]

HESTERBERG & KELLER
COUNSELLORS AT LAW
32 COURT STREET
BROOKLYN, NEW YORK 11201-4404
(718) 875-7450

ALEXANDER G. HESTERBERG (1911-1981)
DAVID KELLER (1927-1990)
ROBERT ADLER*
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ORADELL, NEW JERSEY 07649
(201) 592-0269

3301 SOUTH OCEAN BOULEVARD*
BOCA RATON, FLORIDA 33487

* BY APPOINTMENT ONLY

September 4, 1997

State of New York
Grievance Committee for the Second and
Eleventh Judicial Districts
Municipal Building – 12th floor
210 Joralemon Street
Brooklyn, New York 11201
Attn: Mark F. DeWan, Esq.

Re: Complaint of Clarence Harley
Docket No. K-1213-97

Dear Mr. DeWan:

I received your August 28, 1997 letter on Friday, August 29, 1997.

I have reviewed the complaint of Clarence Harley and the documents sent to me submitted in support thereof and, to the best of my ability, I discern three issues which are raised by Mr. Harley in his letter of June 20, 1997, namely:

1. I represented Russell S. Smith in a matter pending in Surrogate's Court, Kings County, in the Estate of Russell Smith (uncle of Russell S. Smith) prior to my firm representing the Public Administrator of Kings County as Administrator d.b.n. of that same estate, which representation somehow created a conflict of interest which prejudiced the complainant.

2. My firm and I "obscured the frauds of Russell S. Smith and paid the personal creditors of Russell S. Smith as priority creditors of the estate. . . ."

3. I, among other persons, defrauded his office of its fees and disbursements.

I will address each of these issues separately, but I think a chronological summary of the events in this estate will be helpful to the Committee.

1. Russell Smith dies intestate on May 24, 1984.

2. A proceeding is brought by Joseph Smith and Russell S. Smith for co-Letters of Administration, which results in their appointment as co-fiduciaries.

3. Joseph Smith is sent to prison, so Russell S. Smith continues to act as fiduciary.

4. Russell Smith's estate's major asset is a parcel of real property located at 524 Decatur Street, which Russell S. Smith encumbers with two mortgages to prevent the property from being lost for taxes and other liens. The mortgages are held by individual lenders at extraordinarily high interest rates (16%).

5. Joseph Smith is released from prison and, in 1989, hires Carlyet Marshburn, Esq. to represent him in bringing a proceeding in Surrogate's Court, Kings County, to remove his brother as co-fiduciary.

6. In November 1989, Russell S. Smith comes to my firm's office to discuss his uncle's estate and I interview him.

7. I called the Judge's secretary and arranged to get a conference scheduled before said secretary for December 12, 1989.

8. On November 9, 1989, I apparently met Joseph Smith's attorney, Carlyet Marshburn, and advised him as to the status of the case.

9. On November 10, 1989, I wrote a letter to Mr. Marshburn confirming our meeting and the December 12, 1989 conference date.

10. On November 13, 1989, Mr. Marshburn advises me that his client has withdrawn the proceeding seeking to remove Russell S. Smith as fiduciary.

11. I then advised Russell S. Smith that the matter has been withdrawn and there was no need for my firm to represent him.

12. I never asked for or received a retainer agreement or fee from Russell S. Smith.

13. In 1993, proceedings are brought by Joseph Smith, by his new attorney, Dennis Gayle, to remove Russell S. Smith as co-Administrator which results in a conference on August 4, 1993 before Law Assistant Joseph Hughes.

14. Mr. Hughes calls my office and asks if an attorney can go to Court to meet with the clients and attorneys before him, namely, Joseph Smith, Russell S. Smith, Mr. Gayle, Ms. Seidman, Mr. Borchert, Mr. Alleva and Clarence Harley, public accountant. Mr. Alleva represents Russell S. Smith. Mr. Gayle represents Joseph Smith. Mr. Borchert represents a title company who may be liable to one or more of the mortgagees on the decedent's property at 524 Decatur Street. Ms. Seidman represents a mortgagee, and Mr. Harley represents himself. I was available and I went to Court.

With all present, Mr. Hughes explains the problem to me and indicates that he has suggested to the parties that each of the fiduciaries be removed and the Public Administrator

of Kings County be appointed Administrator d.b.n. to try to salvage the estate.

At that meeting, before the Court has rendered its decision and in front of the co-fiduciaries, their attorneys, Mr. Harley and counsel for a lender and title company, Mr. Helmut Borchert tells me that I have seen Mr. Russell S. Smith before. I tell him he is mistaken and I do not recall any events which may have taken place nearly four years earlier. He explains my previous involvement in front of all of the parties and I tell him I have no recollection of the case, but acknowledge I must have met Mr. Smith because I am shown copies of letters on my firm's letterhead which were apparently signed by me.

At no time, thereafter, at that meeting did anyone object to the appointment of the Public Administrator or Hesterberg & Keller as its counsel.

15. The Court rendered its decision and a Decree was prepared on notice to all parties which Decree was signed without opposition. This was done even though the parties had full knowledge of all of the facts of my apparent meeting with Russell S. Smith previously in 1989.

16. The co-fiduciaries filed accountings, each which were objected to by the Public Administrator, which accountings include a claim by the complainant, Clarence Harley, for $15,000.00 for accounting services allegedly rendered. Copies of those Accountings are enclosed.

17. I prepared, on behalf of the Public Administrator, Objections to each of the Accountings. Copies of the Objections filed by the Public Administrator to the Accountings by Russell S. Smith and Joseph Smith are enclosed.

18. Shortly after receiving my Objections to the Account of Russell S. Smith, Mr. Gayle files Objections on behalf of Joseph Smith. A copy is enclosed. Please note the similarity of the Objections, not only in substance, but in form.

I respectfully state that no fair-minded person could possibly come to the conclusion that I have somehow favored Russell S. Smith after reading the Objections I prepared for the Public Administrator opposing Russell S. Smith's Accounting.

19. Dennis Gayle, attorney for Joseph Smith, then, on March 18, 1994, sends a letter to my client, the Public Administrator of Kings County, complaining, in essence, that my firm was favoring Russell S. Smith over his client and the other heirs and asked that the Public Administrator disqualify me and my firm. Mr. Gayle, in his letter, does acknowledge he knew all of the above facts prior to the Public Administrator's appointment but did not object knowing that not only was the Public Administrator was [*sic*] to be appointed but that Hesterberg & Keller would be representing them.

20. My letter responding to Mr. Gayle's letter is attached hereto. Please note my comment regarding the timing of the letter.

21. I have also enclosed a letter from Helmut Borchert, Esq. written, without my prior knowledge, to my client to help clarify the true events of August 4, 1993.

22. The Public Administrator's file in the Estate of Joseph [*sic*] Smith was assigned to me. The major asset of the estate was the decedent's interest in 524 Decatur

Street, Brooklyn, New York. A review of the title report ordered by the Public Administrator revealed that while Russell S. Smith was acting as co-fiduciary, he encumbered it with two separate mortgages, each done in an attempt to prevent the property from being foreclosed or lost for taxes. It appears that, although Mr. Smith was represented by individual counsel, he borrowed money from "hard money lenders" and not from banks or other financial institutions. The result was that he was badly taken advantage of and the estate was saddled with two mortgages with enormous interest rates (16%). In addition, he paid extravagant mortgage broker fees. Further, the mortgage documents are simply signed "Russell Smith," leaving the mortgagees and their title company with clearing up the problem whether the co-fiduciary signed as Administrator or individually. (In reality, Russell S. Smith had, at best, only a one-quarter interest in 524 Decatur Street, and would only get financing if he encumbered the whole property. Therefore, it was likely any litigation on this point would have ultimately found the estate liable on the loans, making Russell S. Smith subject to being surcharged for his acts.)

23. The Public Administrator was afraid the property would be foreclosed leaving a large deficiency, allowing the mortgagees to go after the remaining assets of the estate.

24. I entered into negotiations with the lenders and got them to reduce their claims by approximately $20,000.00 which allowed the Public Administrator to auction the property and close title with a profit for the estate while protecting the remaining estate assets. Copies of the two

Stipulations which I prepared and were ultimately signed by all parties are enclosed.

25. Mr. Harley hires Valerie A. Hawkins, Esq. to bring a proceeding to revoke the Letters of Administration issued to the Public Administrator stating the same grounds as is lodged in his current complaint. This proceeding, pursuant to stipulation of counsel, is dismissed by the Surrogate.

26. The Public Administrator files his Accounting in which Clarence Harley's claim for $15,000.00 is rejected. Clarence Harley files Objections to the Public Administrator's Accounting and issue is joined.

27. I agreed on behalf of the Public Administrator together with all other interested parties, including Mr. Harley and his counsel, to submit Mr. Harley's claim to the Surrogate for decision without filing any papers in opposition or examining him with regard to his alleged services.

28. The Surrogate rendered his decision, a copy of which is attached, dated November 19, 1995, which fixes Mr. Harley's fee in the sum of $1,500.00 plus $170.95 in disbursements.

29. An Order is prepared, on notice, fixing Mr. Harley's fee. The Order is signed without opposition. A copy of that Order dated November 30, 1995 is enclosed.

30. Objections filed by each of the co-Administrators to the other's Accounting and the Objections filed by the Public Administrator to each of the Accountings of the former fiduciaries were settled in open Court, just prior to a trial on the issues. To settle his Objections against Russell S. Smith, Joseph Smith received Russell S. Smith's interest in the decedent's unimproved lot in Quogue, New York,

which passed to the heirs "in kind," and therefore was not part of decedent's probate estate. No fees or commissions were taken by the Public Administrator or his counsel with regard to that property, despite the fact that a Deed and other documents transferring title were prepared for recording for the heirs. A copy of the Deed transferring the decedent's interest in his unimproved land in Quogue, New York, in which Joseph Smith received Russell S. Smith's share, thereby giving him a one-half interest in the property, is enclosed.

31. On January 3, 1997, after the election and installation of a new Surrogate, Hesterberg & Keller was replaced as counsel to the Public Administrator on all matters, including the Estate of Joseph Smith.

32. New counsel, Louis R. Rosenthal, Esq., brought the Public Administrator's Accounting up-to-date and filed a final Decree concluding the estate. The Decree was signed without opposition and Mr. Harley was paid. A copy of that Decree is enclosed.

Let me now address the three individual items of complaint.

I. CONFLICT OF INTEREST

Although in 1993, I had no recollection of meeting with Mr. Russell S. Smith, it is obvious that I had intervened on his behalf in 1989 in a proceeding brought by his brother to have Mr. Smith removed as fiduciary.

What occurred on August 4, 1993 before Law Assistant Joseph Hughes was not uncommon for the Court or the Public Administrator's office. He was faced with a situa-

tion in which both co-fiduciaries should probably be removed, one apparently because he was a convicted felon, and the other because he had, among other things, mishandled the estate. In addition, the two remaining distributees took no active role and, upon information and belief, wanted no part in being appointed administrator d.b.n.

The only possible solution was to appoint the Public Administrator, which appointment I never suggested nor sought. When Mr. Hughes asked me to attend the conference, I had no knowledge of ever meeting Russell S. Smith or doing anything on his behalf. As previously stated, I had no retainer agreement with him, written or otherwise, no file, and did not seek or receive a fee.

I had no knowledge that a conference was being held on August 4, 1993 before Joseph Hughes called my office.

In any event, all of these factors were brought out to all of the parties including Mr. Harley on August 4, 1993, prior to the appointment of the Public Administrator, and no objection was raised nor any papers submitted in opposition to the order appointing the Public Administrator.

It was only after the co-fiduciaries accounted to the Public Administrator and the remaining heirs, and the Public Administrator objected to the fee of Mr. Harley did any one raise objections to Hesterberg & Keller acting as counsel to the Public Administrator in this matter.

I once again respectfully refer the Committee to (a) the Objections filed by the Public Administrator to Russell S. Smith's Accounting; and (b) the unsolicited letter sent to the Public Administrator by attorney Helmut Borchert after he received a copy of Mr. Gayle's letter of March 18, 1994.

II. HESTERBERG & KELLER OBSCURED FRAUDS OF RUSSELL S. SMITH AND GAVE PREFERENCE TO CREDITORS

A review of the facts show that the Public Administrator filed Objections to the Accounting of Russell S. Smith and charged him with negligence in handling his uncle's estate and asked the Court to personally surcharge him for more than $60,000.00.

I personally re-negotiated the mortgages placed upon the property by Russell S. Smith and saved the estate approximately $20,000.00 and protected the other estate assets from the mortgagees.

The creditors who were paid on the sale of 524 Decatur Street, Brooklyn, New York, were not preferred over other creditors of the estate or its heirs, but were the holders of mortgages and judgments or other liens on said property. They had to be paid at the closing.

In any event, the Estate of Russell Smith was solvent and all creditors, to the extent that their claims were approved by the Administrator or allowed by the Surrogate, were paid in full. Further, the Objections to the Accountings filed by the parties and the Public Administrator were resolved in open Court and agreed to by Joseph Smith and Russell S. Smith.

III. HESTERBERG & KELLER DEFRAUDED MR. HARLEY FROM HIS FEE

The claim of Mr. Harley for $15,000.00 for accounting services rendered was properly objected to by the Public Administrator. In view of the amount accounted for by the co-fiduciaries, and without substantiation, the fee appeared to be excessive and the Public Administrator had no choice but to reject the claim.

Mr. Harley never submitted anything to the Public Administrator or the Court which could possibly justify his fee.

The Surrogate, in his decision, recites that, on January 18, 1995, Mr. Harley asks the Court for additional time to justify his fee. He was given 30 days. In fact, he was given nearly 10 months to support his claim before a decision was rendered and nothing was forthcoming.

As previously indicated, no papers were submitted by the Public Administrator or my firm in opposition to any documents submitted by Mr. Harley to substantiate his claim. The Public Administrator simply allowed the Surrogate to determine the value of Mr. Harley's services.

Finally, this writer appreciates that it is Mr. Harley's right to file a complaint against anyone who he thinks may have acted improperly against him. However, a review of Mr. Harley's letter indicates that he has raised issues which in no way affected his claim against the estate and has complained of everyone who seems to have been associated with the case including the Court Attorney/Referee and his own attorney.

The reality is, Mr. Harley was treated more than fairly by the Public Administrator, his counsel and the Court, but simply could not establish his rights to the fee he sought.

I believe my letter and the enclosures more than adequately responds to Mr. Harley's complaint, but if the Committee wishes additional documentation or to speak with me directly, please feel free to contact me.

Very truly yours,

/s/ Robert Adler
ROBERT ADLER

RA/bb

APPENDIX F

DEED

12063PG092	2	3
Number of pages 5	[STAMPED] RECEIVED $ 484 REAL ESTATE AUG 15 2000 TRANSFER TAX SUFFOLK COUNTY	[STAMPED] RECORDED 2000 AUG 15 PM 12:22 EDWARD P. ROMAINE CLERK OF SUFFOLK COUNTY
TORRENS		
Serial #		
Certificate #		
Prior Ctf #	2059	
Deed/Mortgage Instrument	Deed/Mortgage Tax Stamp	Recording/Filing Stamps

4 FEES

Page/Filing Fee	15		Mortgage Amt.
Handling	5		1. Basic Tax
TP-584	5		2. Additional Tax
Notation			Sub Total
EA-52 17 (County)	5	Sub Total 30	Spec./Assit. Or Spec./Add.
EA-5217 (State)	25		
R.P.T.S.A.	15		TOT. MTG. TAX
Comm of Ed.	5.00	[ROUND SEAL] SUFFOLK COUNTY NEW YORK	Dual Town Dual County Held for Apportionment
Affidavit			Transfer Tax 484
Certified Copy			Mansion Tax
Reg. Copy		Sub Total 45	The property covered by this mortgage is or will be improved by a one or two family dwelling only. YES __ or NO __ If NO, see appropriate tax clause on page # __ of this instrument.
Other		GRAND TOTAL 75 [?]	

5	Real Property Tax Service Agency Verification				6	Community Preservation Fund
[round stamp]	Dist.	Section	Block	Lot	Consideration Amount $ 121,000	
Stamp	0902	003.00	02.00	025.000	CPF Tax Due	$ 420.-
Date [Illegible]						Improved ____
Initials /s/						Vacant Land X

[STAMPED]
RECEIVED
$ 420
AUG 15 2000
COMMUNITY PRESERVATION FUND

7 Satisfactions/Discharges/ Releases List Property Owners Mailing Address

RECORD & RETURN TO:

KEVIN J. POWERS, ESQ.
BOX 682
CENTER MORICHES, NY 11934

TD 0902
TD ____
TD ____

8	**Title Company Information**
Co. Name	Chicago Title Insurance Co.
Title #	3800-00775

9	**Suffolk County Recording & Endorsement Page**

This page forms part of the attached DEED - EXECUTOR'S made by:
(SPECIFY TYPE OF INSTRUMENT)

PUBLIC ADMINISTRATOR
OF KINGS COUNTY
TO
MALRY L. TARDD, JR.

The premises herein is situated in
SUFFOLK COUNTY, NEW YORK.
In the Township of Southampton .
In the VILLAGE
or HAMLET of Quogue

BOXES 5 THRU 9 MUST BE TYPED OR PRINTED IN BLACK INK ONLY PRIOR TO RECORDING OR FILING.

EXECUTOR'S DEED

THIS INDENTURE, made the 2nd day of August, in the year Two Thousand

BETWEEN

PUBLIC ADMINISTRATOR OF KINGS COUNTY, with offices at 2 Johnson Street, Brooklyn, New York 11201,

as administrator of the Estate of RUSSELL SMITH late of 9 Montauk Highway, Quogue, New York who died intestate on the 24th day of May, nineteen hundred and eighty-four.

party of the first part, and

Malry L. Tardd, Jr., residing at 11 Montauk Highway, P.O. Box 1210, Quogue, New York

party of the second part,

WITNESSETH, that the party of the first part, to whom Letters of Administration were issued by the Surrogate's Court, Kings County, New York, on August 5, 1993 and by virtue of the power and authority given by Article 11 of the Estates, Powers and Trusts Law, and in consideration of

ONE HUNDRED TWENTY-ONE THOUSAND ($121,000.00) dollars, paid by the party of the second part, does hereby grant and release unto the party of the second part, the distributees or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York bounded and described as follows:

ALL THAT CERTAIN PLOT, PIECE, OR PARCEL OF LAND, SITUATE, LYING AND BEING IN THE INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, COUNTY OF SUFFOLK AND STATE OF NEW YORK AND ACQUIRED BY TAX DEED ON MAY 12, 1992 FROM GENERAL L. RAINS, THE DEPUTY COUNTY TREASURER OF SUFFOLK COUNTY, NEW YORK AND RECORDED ON MAY 21, 1992 IN LIBER 11470 CP 239/240 AND OTHERWISE KNOWN AS AND BY INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, SCH DIST 3 N-JACKSON E-SCHUNK S-MONTAUK HWY W-PILZER.

DEED DESCRIPTION ATTACHED SCHEDULE A

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances, and also all the estate which the said decedent had at the time of decedent's death in said premises, and also the estate therein, which the party of the first part has or has power to convey or dispose of, whether individually, or otherwise; TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the distributees or successors and assigns of the party of the second part forever.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

/s/ MARIETTA SMALL
Public Administrator, Kings County

[Stamped Number: 12063PG092]

UNIFORM FORM CERTIFICATE
OF ACKNOWLEDGMENT
(Within New York State)

State of New York)
County of Kings) ss.:

On the 2nd day of August in the year 2000 before me, the undersigned, personally appeared Marietta Small personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies) and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

/s/ RICHARD PAUL JR.
Signature and Office of individual
taking acknowledgment

[STAMP]
RICHARD PAUL JR.
Notary Public, State of New York
No. 01PA5079439
Qualified in Kings County
Commission Expires June 2, 2001

CHICAGO TITLE INSURANCE COMPANY

Title No. 3800-00775

LEGAL DESCRIPTION

ALL THAT CERTAIN PLOT, PIECE, OR PARCEL OF LAND, SITUATE, LYING, AND BEING IN THE INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, COUNTY OF SUFFOLK AND STATE OF NEW YORK BEING BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT A MONUMENT SET IN THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80) DISTANT 293.85 FEET EASTERLY FROM THE CORNER FORMED BY THE INTERSECTION OF THE EASTERLY SIDE OF OLD MAIN ROAD (OLD QUOGUE-RIVERHEAD ROAD) WITH THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80);

RUNNING THENCE NORTH 00 DEGREES 18 MINUTES 40 SECONDS WEST ALONG LAND NOW OR FORMERLY OF NEW YORK STATE 260.40 FEET TO A MONUMENT AND LAND NOW OR FORMERLY BERTHA ARCH JACKSON;

THENCE NORTH 86 DEGREES 15 MINUTES 20 SECONDS EAST ALONG LAST MENTIONED LANDS 75.26 FEET TO LAND NOW OR FORMERLY OF MALRY TARDD, JR.;

THENCE SOUTH 05 DEGREES 14 MINUTES 10 SECONDS EAST ALONG LAST MENTIONED LAND 265.89 FEET TO THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80);

THENCE SOUTH 89 DEGREES 41 MINUTES 20 SECONDS WEST ALONG THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80) 97.95 FEET TO A MONUMENT SET AT THE POINT OR PLACE OF BEGINNING.

FOR INFORMATION ONLY: DISTRICT 0902 SECTION 003.00 BLOCK 02.00 LOT 025.00

LEGAL —LEGAL DESCRIPTION—

STATE OF NEW YORK, COUNTY OF _____
[ILLEGIBLE].
On the __ day of _____ 2000, before me personally came _____
to me known, who, being by me duly sworn, did depose and say that he resides at No. _____
_____
that he is the _____
of _____
_____, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed [?] _____ name thereto by like order.

STATE OF NEW YORK, COUNTY OF KINGS.
On the __ day of _____ 2000, before me personally came JOEL GARZMAN
Deputy Public Administrator of Kings County, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

_____
_____
_____

STATE OF NEW YORK, COUNTY OF _____
On the __ day of _____ 2000, before me personally came _____

the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No. _____ _____ that he knows _____ _____ to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw _____ execute the same; and that he, said witness, at the same time subscribed [?] _____ same as witness thereto.

CHICAGO TITLE INSURANCE CO.
PUBLIC ADMINISTRATOR'S DEED

TITLE NO. 3800-00775

Public Administrator of Kings County,
as Administrator _____ of the Estate of

RUSSELL SMITH

Deceased

TO

MALRY TARDD, JR.

SECTION	3
BLOCK	2
LOT	25
COUNTY OR TOWN	
STREET ADDRESS	9 Montauk Highway Quogue, New York

STANDARD FORM OF NEW YORK BOARD
OF TITLE UNDERWRITERS
Distributed by
THE TITLE GUARANTEE COMPANY

Recorded As Request of The Title Guarantee Company
RETURN BY MAIL TO:

Kevin J. Powers
Attorney At Law
Seven Sonic Avenue, Box 862
Center Moriches, NY 11934

[Illegible]

APPENDIX G

Letter dated October 18, 2002

[LETTERHEAD]

A. GAIL PRUDENTI
Presiding Justice

(631) 852-3858
Fax (631) 852-1456

Appellate Division
Supreme Court of the State of New York
Second Judicial Department
210 Center Drive
Riverhead, New York 11901

October 18, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Dear Mr. Harley:

I am Presiding Justice A. Gail Prudenti's principal law clerk. Justice Prudenti asked me to review your present and past correspondence, including all the material you submitted, as well as the responses you received from Ms. Hannon.

First of all, I am not sure if you are aware that Ms. Hannon forwarded your most recent correspondence, dated September 30, 2002, including the affidavit from Mr. Joseph L. Smith, to Diana M. Kearse, the Chief Counsel to the Grievance Committee for the Second and Eleventh Judicial Districts as "new or additional evidence for your

consideration" and to "take whatever action you deem appropriate."

Accordingly, the matter is being reviewed preliminarily and I suggest that you wait for the results of that review.

I would like to make the general point, however, that Ms. Hannon's numerous responses to your previous letters to the Presiding Justice are correct. That is, the authority of the Presiding Justice is not without limitations. Her authority, for example, does not provide for interfering with, overruling or even reviewing the administrative decisions of bodies established under law, such as the Grievance Committees, or acting as an appellate court of one over decisions from trial courts, such as the Surrogate's Court.

Accordingly, insofar as the Presiding Justice is concerned, it is not a question of whether or not she agrees with your conclusions or whether she is sympathetic to your concerns, she simply has no authority by the nature of her position to act on those concerns. Indeed, if she did take any action, she would be acting inappropriately.

This is not to say you are without remedies—either administratively or judicially—but writing to the Presiding Justice does not lead to such a remedy. Incidentally, with regard to your comments about the file in the Surrogate's Court, you should bring your concerns in that regard to the Chief Clerk of the Surrogate's Court or, if that does not satisfy you, to the Administrative Judge for that judicial district.

The Presiding Justice hopes you understand and appreciate the constraints of her position. If you need assistance in pursuing whatever remedies may be available to you, you should seek the advice of counsel. Unfortunately, judges and employees of the court system are not permitted to provide legal advice.

I am sorry we cannot be of any more assistance to you.

Very truly yours,

/s/ ROBERT A. MARGOLIN
ROBERT A. MARGOLIN
Principal Law Clerk to
A. Gail Prudenti,
Presiding Justice

RAM:r

cc: Diana M. Kearse, Esq.
Joan L. Hannon, Esq.

[LETTERHEAD]

(718) 875-1300

STATE OF NEW YORK
APPELLATE DIVISION, SUPREME COURT
2nd JUDICIAL DEPARTMENT
45 Monroe Place
Brooklyn, New York 11201

[Seal]
Chambers of
Presiding Justice

June 3, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.

Dear Mr. Harley:

I am in receipt of your letters dated March 23 and April 30, 2002, to Presiding Justice A. Gail Prudenti.

Your complaint of professional misconduct against the aforementioned attorney was reviewed by the Grievance Committee for the Second and Eleventh Judicial Districts, which determined that there was no breach of the Code of Professional Responsibility. That determination was subsequently reviewed by an individual Committee member, who was unable to find any basis for reversing the original determination.

Upon reviewing the materials submitted by you, we find no reason to re-open the matter or to depart from the Grievance Committee's determination. The transcript of

the proceedings in the Surrogate's Court on January 19, 1995, reveal that the Surrogate, who was in the best position to make a determination, found that there was no conflict of interest whatsoever (p. 24). Moreover, the Public Administrator, whom Mr. Adler represented, did not oppose your claim and left it to the court to determine the value of your services (p. 42).

This court is not empowered to conduct a full-scale reinvestigation of your complaint. Other than a review of the Grievance Committee's determination by an individual Committee member and a further review by a court attorney, both of which have occurred, there is no further recourse.

This matter is now considered closed. There is nothing further that this office or the Grievance Committee can do to assist you. You are, of course, free to pursue whatever civil remedies may be available to you, subject to the applicable Statutes of Limitation.

Sincerely,

/s/ JOAN L. HANNON

JOAN L. HANNON
Principal Appellate
Court Attorney

[LETTERHEAD]

(718) 875-1300

STATE OF NEW YORK
APPELLATE DIVISION, SUPREME COURT
2nd JUDICIAL DEPARTMENT
45 Monroe Place
Brooklyn, New York 11201

[Seal]
Chambers of
Presiding Justice

August 20, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.

Dear Mr. Harley:

I am in receipt of your letter dated July 29, 2002, to Presiding Justice A. Gail Prudenti.

As I explained to you in my previous letter, this court is not empowered to conduct a full-scale re-investigation of your complaint. Other than a review of the Grievance Committee's determination by an individual Committee member and a further review by a court attorney, both of which have occurred, there is no further recourse.

If you have additional documents that were not previously considered by the Grievance Committee, you may request that the Committee reconsider the matter in light of such additional evidence. However, absent any new or additional evidence, the matter is considered closed, and

there is nothing further that this office or the Grievance Committee can do to assist you.

You are, of course, free to pursue whatever civil remedies may be available to you, subject to the applicable Statutes of Limitation.

Sincerely,

/s/ JOAN L. HANNON
JOAN L. HANNON
Principal Appellate
Court Attorney

APPENDIX H

Letter dated Oct. 28, 2002

[LETTERHEAD]

MCMANUS, COLLURA & RICHTER, P.C.
ATTORNEYS AT LAW
FORTY-EIGHT WALL STREET
NEW YORK, NEW YORK 10005
(212) 425-3100
FAX (212) 425-3175

JOHN A. MCMANUS
ANTHONY M. COLLURA
ANNE PATRICE RICHTER*
ANN MARIE FORTE*
SUSAN M. JOHNSON
CHRISTOPHER D. SKOCZEN
BRADLEY E. DUBIN
*ALSO ADMITTED IN CONN.
*ALSO ADMITTED IN N.J.

RONALD A. BALZANO*
NICHOLAS P. CHRYSANTHEM
OF COUNSEL

October 28, 2002

Robert C. Ebeling, Esq.
The Law Offices of Richard C. Ebeling, P.C.
200 East Post Road
White Plains, New York 10602

Re: Harley v. Hesterberg & Keller, et al.
New York Supreme Court, Kings County
Index No.: 5058[illegible]/00

Dear Mr. Ebeling:

This letter follows up our recent telephone conversation wherein you confirmed that you continue to represent the plaintiff in the above captioned matter. According, we request that you advise your client that all communications must be conducted through your office. Further, please be advised that service by your client of a document entitled Supplemental Request for Production of Documents is hereby rejected by this office.

Very truly yours,

/s/ ANN MARIE FORTE
Ann Marie Forte
AMF/pm
HARLEY/Letter21

APPENDIX H-1

Excerpts of Supplemental Request
for Production of Documents

SUPREME COURT: STATE OF NEW YORK
COUNTY OF KINGS

Index: 50587/00

CLARENCE HARLEY

Plaintiff,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER

Defendants.

Supplemental Request for Production of Documents

PLEASE TAKE NOTICE, that the plaintiff Clarence Harley demand that, defendants Robert Adler Individually and as a Partner of Hesterberg & Keller, Johnathan [*sic*] L. Mate, Gregory X. Hesterberg, Individually and as Partners of Hesterberg & Keller, the law firm of Hesterberg & Keller, pursuant to CPLR 3102(a) produce for inspection

and copying the following documents at the Offices of McManus, Collura & Richter, PC 20 Exchange Place New York, NY 10005 within 20 days of the date of this demand.

DEFINITIONS

1. "Document" means all written, reported, recorded or graphic matter, however produced or reproduced, including, but not limited to memoranda, reports, financial reports, notes, letters, envelopes, telegrams, messages, including reports, notes and memoranda of telephone conversations and conferences, studies, analysis, newspapers, booklets, circulars, bulletins, notices, instructions, handwritten notes, records, studies, pamphlets, voice recordings, reports, work papers, drafts, calendars, date book, surveys, charts, graphs and checks (both sides).

2. "Communication" or "Communicated" means any oral statement, dialogue, colloquy, discussion, or conversation, and also means ant [*sic*] transfer of thoughts or ideas of persons by

* * *

e) Respond to that aspect or a part of the request to which you do not have any objection.

DOCUMENTS REQUESTED

1. Copies of all documents relied, consulted, referred to in formulating your response to Plaintiff's Combined Demands.

2. Copies of all documents referred to in Robert Adler's position papers dated September 4, 1997 and November 20, 1997 to the Grievance Committee (Exhibit J and K of Verified Complaint)

3. Copies of two stipulation signed by parties referred to in point #24 of Robert Adler's position paper to the Grievance Committee dated September 4, 1997 (Exhibit J of Verified Complaint)

4. Copies of all documents and communications related to the Michael Mazza payment of $29,696.00 on 2/2/94 (copy of canceled check, money order etc [*sic*]), including invoice and/or claim filed with the Public Administrator and/or Surrogate.

5. Copies of all documents and communications between Adler and Gary Mund related to the Estate Proceeding.

6. Copies of all documents and communications between n [*sic*] Adler and Gary Mund related to the plaintiff's applications filed in the Surrogate's Court, Kings County.

7. Copy of "stipulation of counsel" as referred to in point #25 of Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

8. Copies of all documents relied upon to form opinion referred to in point #22 of Robert Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

9. Copies of all documents and communications related to the Beth Sussman payment of $42,827.96 on 2/2/94 (copy of canceled check, money order etc[*sic*]), including

invoice and/or claim filed with the Public Administrator and/or Surrogate Court.

10. Copies of objections filed by plaintiff to the Administrator's Accounting as referred to in point #26 of Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

11. Copies of documents relied upon to form opinion referred to in point #23 of Robert Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

12. Copy of formal writing withdrawing the plaintiff's Petition to remove the Public Administrator as referred to in Adler's letter dated December 12, 1994, to Valerie Hawkins. (Exhibit K of Verified Complaint or alternatively part to Adler's position paper dated November 20, 1997).

13. Copies of all appraisals on property in the Estate Proceeding.

14. Copies of all documents and communications related to appraisals on all property in the Estate Proceeding.

15. Copies of all Stipulations signed by Joseph L. Smith in the Estate Proceeding.

16. Copies of all Stipulations signed by Harold Smith in the Estate Proceeding.

17. Copies of all documents and communications related to the payment to NYC Dept of Finance on 2/8/95 for $7,182.69; including method of payment (copy of canceled check, money order etc [*sic*]), invoice or contract supporting payment.

18. Copies of all documents and communications related to the payment to American Title Co on 3/13/95 for $2000.00 including method of payment (copy of canceled check, money order etc[*sic*]), invoice or contract supporting disbursement; including alleged stipulation related to disbursement.

19. Copies of all documents and communications related to the agreement/contract with J.A.L. Management for managing property at 632 Decatur Street.

20. Copies of all documents and communications related to East New York Savings Bank settlement of action for wrongful payment of A/C #1-5035791-2.

21. Copies of all documents and communications filed by Beth Sussman and/or representative of Beth Sussman related to claim in the Estate Proceeding.

22. Copies of all claims filed by Michael Mazza and/or representative of Michael Mazza related to claim in the Estate Proceeding.

23. Copies of all Stipulations signed by the plaintiff.

24. Copies of all documents and communications related to the Sale of estate property in Brookhaven New York for $25,000.00 on January 4, 1994.

PLEASE TAKE FURTHER NOTICE, that the forgoing [*sic*] demand is a continuing demand and in the event the materials become available after designated date, they should be forwarded to the plaintiff within twenty (20) days of receipt. In the event that said materials are not produced for inspection and/or photocopying as required herein the undersigned will move this Court to invoke the penalties applicable under Article 31 of the CPLR.

September 25, 2002

/s/ CLARENCE HARLEY

CLARENCE HARLEY
424 Park Avenue South #111
New York, NY 10016
(212) 479-7375

ANN MARIE FORTE
McManus, Collura & Richter, PC
48 Wall Street
New York, NY 10005
(212) 425-3100

No. 04-1194

SUPREME COURT, U.S.
FILED
APR 22 2005

In The

Supreme Court of the United States

CLARENCE HARLEY,

Petitioner,

vs.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

SUPPLEMENTAL BRIEF

CLARENCE HARLEY
2366 Seventh Ave – Suite 2
New York, NY 10030
(212) 479-7375

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EXHIBIT D – Petitioner's Grievance Letter dated 7/29/02 ..... S-App. 6

EXHIBIT E – Prior Surrogate Court Petition .... S-App. 11

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INTRODUCTION

The case having been docketed by the Court on March 9, 2005 and the respondents having failed to submit a respondents' brief, the petitioner submits this supplemental brief in support of the original petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The petitioner having heretofore demonstrated that the case has so far departed from accepted and usual course of judicial proceedings and/or the lower courts have sanctioned extreme departures, as to call for an exercise of this Court's supervisory power. The failure of the respondents to respond to the petition is an inherent signal that the likelihood of continued backdoor preference which has been afforded them, heretofore, will cease.

This case presents novel issues where the lower courts allowed the respondents to pervert the law on the principles of res judicata. The record shows a complete failure of administrative bodies established under law, such as the grievance committees and the appellate division, to carry-out their mandate either to uphold the bar against corrupt and unscrupulous attorneys and/or attorney dealings and/or upholding the Constitutional rights of parties accessing the judicial system, respectively.

A. Lower Court's Improper Dismissal

Submitted for the Courts review is an excerpt from the underlying Surrogate action at Exhibit E, S-App. 11 which documents the prior issues before the Surrogate. The issues were the mismanagement of the estate as

result of purported sanctioning improper acts of Russell S. Smith namely, but not limited to, payments to Russell S. Smith's creditors which represented a violation of EPTL §11-4.7(a) and the appearance by the respondents as counsel for the public administrator.

The petition is devoid of any issues claiming fraud, deceit and collusion with the participating attorneys and/or devoid of a Judiciary Law section 487 claim. Notwithstanding, the application was never adjudicated (see App. 40a of petition).

The respondents' arguments before the lower courts at S-App. 16 are without merit.

New York Courts have identified when an attorney is liable to a third party in *Newberger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977) and *Singer v. Whitman and Ransom*, 83 A.D.2d 862, 442 N.Y.2d 26 (1981). Admission to the bar does not create a license to act maliciously, fraudulently or knowingly to tread upon the rights of others. Section 487 of Judiciary Law provides for a cause of action against an attorney where the deceit or collusion with the intent to deceive any party, occurred in a pending proceeding. It is sufficient if the deception relates to a prior judicial proceeding. Although the circumstances were pleaded by the petitioner, the lower courts failed to apply the circumstances to the case before the Court.

Consequently, the issue before the Court is whether the dismissal by the lower courts was rendered with a mental reservation or purpose of evasion of the petitioner's constitutional due process rights afforded by the V, VII and XIV Amendments to the Constitution of the United States.

B. Lengthy Administrative Apathy

Submitted for the Court's scrutiny is the submission of the respondent Robert Adler's letter dated November 10, 1989 wherein he affirmatively memorialized his court appearance on behalf of Russell S. Smith in the same referenced estate where he and his firm, thereafter, represented the Public Administrator. Also submitted is the affidavit of Joseph L. Smith at Exhibit A, S-App. 1, denying authorization and/or consent to a stipulation to pay the personal debts of Russell S. Smith. The affidavit directly refutes respondent Adler's position to the grievance committee that stipulations to pay personal loans of Russell S. Smith were signed by everyone (App. 55a-56a of petition).

Robert Adler claimed that said property was transferred to the beneficiaries by deed. Excerpt of the Surrogate's Court hearing, dated February 26, 1996 confirms the matter as is at Exhibit H, S-App. 22 and at App. 56a-57a of the petition. However, the record before the Court reflects the sale of said Quoque property by the public administrator for $121,000 on or about August 2, 2000, at App. 61a-70a of the petition. Certainly, the sale of that property beyond the jurisdiction of the public administrator's office should be considered a theft of property.

Joseph L. Smith raised his objections during the initial hearing on January 18, 1995 before the Surrogate as well as the petitioner raised objections but was fined $10,000 as is reflected in the record at Exhibit H, S-App. 22.

Moreover, the record before the Court has already established the respondent Robert Adler affirmatively misrepresented the issue of a "stipulation of counsel" with the petitioner's attorney at App. 56a and 37a-39a of the

Petition. In actuality respondent Adler's position statements, encompassing the above matters, are replete with misrepresentations. The circumstances are sufficient to have raised ethical considerations of the New York Code of Professional Responsibility. With so much information in the hands of the committee as is reflected in the petitioner's July 29, 2002 correspondence to the committee at Exhibit D, S-App. 6-10, how is it the committee continued *not* to find ethical violations? The proscription of DR 1-102 and DR 5-108, not deemed to be complete, were affirmatively violated. The relevant section of the rule reads as follows:

DR 1-102. Misconduct

A. A lawyer shall not:

1. Violate a Disciplinary Rule.

2. Circumvent a Disciplinary Rule through the actions of another

* * *

4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

5. Engage in conduct that is prejudicial to the administration of justice.

DR 5-108. Conflict of Interest – Former Client

A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:

1. Thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client.

> 2. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> * * *
>
> 5. Engage in conduct that is prejudicial to the administration of justice.

It is the joint apathy of the grievance committee and the appellate court, that fostered the predatory practices engaged in by the respondents.

The dismissal of the case barred the petitioner from raising the circumstances of the improper sale of property, the improper statements regarding a stipulation claimed by the participating attorneys and the improper statements about the monetary value of the estate. If the respondents employed the efforts of others to perfect the egregious outcomes, then the respondents engaged in fraud, collusion and deceit invoking the provisions of Judiciary Law section 487.

An issue before the Court is whether the dismissal by the lower courts was rendered with a mental reservation or purpose of evasion of the petitioner's constitutional due process rights afforded by the V, VII and XIV Amendments to the Constitution of the United States.

It is for this Court to determine whether the failure to find violative issues by the administrative bodies established under law such as the grievance committee, the Supreme Court, and the appellate court was deliberate, with a mental reservation or purpose of evasion of the petitioner's constitutional rights and accordingly, invokes section 42 USCA §1986.

The statute reads in its relevant parts:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned

in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented. . . . " **42 USCA §1986**

CONCLUSION

The petition for a writ of certiorari should be granted. And given the respondents failure to make a showing, summary disposition should be granted in favor of the petitioner.

Respectfully submitted,

CLARENCE HARLEY

Dated: April 21, 2005

EXHIBIT A

Affidavit

STATE OF NEW YORK)
ss.:
COUNTY OF)

Joseph L. Smith, being duly sworn, deposes and says:

I was an interested party in the Estate of RUSSEL SMITH (Index No. 3219//85) held before the Surrogate's Court, Kings County. I further declare that I **did not** sign my name to any stipulation, nor consented to any stipulation or agreement proposed by the Public Administrator (Samuel Plotkin), or representative or agent for the Public Administrator, whereby, the Estate of RUSSELL SMITH would assume and/or pay personal loans – unsecured or otherwise, entered into by Russell Smith (a/k/a Russell S. Smith) during the pending administration of the Estate of RUSSELL SMITH.

/s/ Joseph L. Smith

/s/ Joseph Lynn Smith

/s/ Prasad Reddy Guntaka
PRASAD REDDY GUNTAKA
Notary Public –
State of New York
No. 01GU6078731
Qualified in Queens County
Certificates filed
in Kings County
My Commission Expires
August 5, 2006

STATE OF NEW YORK
COUNTY OF KINGS SS:

SWORN TO BEFORE ME
THIS 20th DAY OF
Sep. 2002

EXHIBIT B

Hesterberg & Keller
COUNSELLORS AT LAW
32 COURT STREET
BROOKLYN, NEW YORK 11201

(718) 875-7550

[Names and Addresses Omitted In Printing]

November 10, 1989

Carlyet D. Marshburn, Esq.
26 Court Street, Suite 903
Brooklyn, New York 11242

RE: Estate of RUSSELL SMITH

Dear Mr. Marshburn:

This will confirm our meeting in court on November 9, 1989 wherein I advise you that the proceeding brought by you on behalf of Joseph Lynn Smith has been adjourned to December 19, 1989.

The law secretary to Surrogate Bloom has graciously afforded us a Conference date on December 12, 1989 at 10:00 a.m. in his office to see if a meeting of the parties can resolve the issues involved.

I also hope that perhaps the parties can agree on a course of action prior to the December 12 Conference date, but, if that proves unsuccessful, I will meet you at Mr. Mack's office on December 12, 1989 and will bring Russell Smith with me. I suggest that you have Joseph Smith available as well.

If I can be of any help in the meantime, please feel free to contact me.

Yours truly,

ROBERT ADLER

RA: jw
cc: George Mack, Law Secretary
to Surrogate Bloom Russell Smith

EXHIBIT C

State of New York

Grievance Committee
for the
Second and Eleventh Judicial Districts

Renaissance Plaza
335 Adams Street – Suite 2400
Brooklyn, New York 11201-3745
(718) 923-6300

[Names Omitted In Printing]

October 30, 2002

PERSONAL AND CONFIDENTIAL

Mr. Clarence J. Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.
Docket No. K-1213-97

Dear Mr. Harley:

Your letter of September 30, 2002, which included an affidavit from Joseph L. Smith, has been forwarded to this Committee by Joan Hannon, Principal Appellate Court Attorney at the Appellate Division, Second Department.

Our records indicate that you filed a complaint against the above-named attorney in July 1997. Your complaint was investigated by the staff of the Grievance Committee. By letter dated April 15, 1998 (copy enclosed), you were advised that the full Committee had dismissed your complaint, finding that there was insufficient evidence of professional misconduct to warrant a sanction against the attorney.

Thereafter, at your request, your file was reviewed by a member of the Grievance Committee. By letter dated June 16, 1998 (copy enclosed), then Chairman Barry Karnins advised you that no basis was found upon which to re-open the file.

Then, in response to further communications from you, Robert H. Straus, then Chief Counsel, wrote to you on June 29, 1998 (copy enclosed), suggesting that you consult an attorney to discuss what civil remedies might be available to you.

We have again reviewed your file, dating back to 1997, along with your recent submission, namely an affidavit from Joseph L. Smith. However, we have again concluded that there is no evidence of professional misconduct warranting the imposition of discipline by this Committee.

This Committee does not have jurisdiction over matters which were before the Surrogate's Court. Again, if you have not already done so, you should consult an attorney to discuss what actions, if any, you might pursue with respect to the estate in question.

Again, we regret we can be of no assistance to you.

Very truly yours,

/s/ Diana M. Kearse
Diana Maxfield Kearse
Chief Counsel

DMK/kf
Enclosures

cc: Joan Hannon, Esq.
Robert C. Margolin, Esq.

EXHIBIT D

Clarence Harley
424 Park Ave South 111
New York, NY 10016

July 29, 2002

A. Gail Prudenti, Presiding Justice
New York State Supreme Court
Appellate Division 2nd Department
45 Monroe Place
Brooklyn, NY 11201

RE: Robert Adler, Esq.

Madam Justice:

I am in receipt of a letter from Joan Hannon, Principal Appellate Court Attorney, dated June 3, 2002.

Ms. Hannon's letter raised the issue of a prior complaint where Robert Adler and his firm mismanaged and misappropriated monies of an estate. The Grievance Committee dropped the ball during that investigation and sanctioned egregious misconduct and highly specious statements by the above respondent.

There are two principal issues relevant here and in the prior complaint. The first relates to Robert Adler's violation of fiduciary duty by, among other things, ignoring the law, improperly making payments to related and/or third parties with estate monies and hiding frauds of a prior client. The second relates to Mr. Adler going before the Surrogate and announcing that he had an agreement with unspecified parties to withdraw my petition filed before the court, even asserting to the grievance committee (hereafter referred to as the 2nd and 11th Committee) he

had perfected a "stipulation of counsel" – when actually those assertions were untrue.

I attach, for your direct review, statements submitted by Mr. Adler to the 2nd and 11th Committee dated September 4, 1997, and November 20, 1997, wherein he was substantively impeached on material assertions made to that committee (highlighted markings).

The 2nd and 11th Judicial Committee never compelled Mr. Adler to support material representations made before it:

- Mr. Adler failed to produce a stipulation of counsel between himself and Valerie Hawkins or any other attorney. Mr. Adler is seen lobbying for a formal written agreement in his December 12, 1994 letter to Valerie Hawkins (attached). But no stipulation was ever filed as shown by Valerie Hawkins' letter dated December 5, 1997 (attached).

- Mr. Adler failed to produce an agreement embodying the statement(s) made before the Surrogate on January 18, 1995, regarding my applications before the court.

- Mr. Adler failed to produce any stipulation signed by Joseph Smith and Harold Smith reforming two loans entered into by Russell S. Smith.

Finally, the 2nd and 11th Committee sanctioned Mr. Adler's November 20, 1997 statement (which buttressed his speculative position) that there were three Accountings before the Surrogate on January 18, 1995 when in fact

that was shown to be untrue.[1] Not only were the relevant documents in the hands of the Committee, but I also pointed out to the Committee the false and contradicting statements.

* * *

I am unconvinced of the 2nd and 11th Committee's determination since Mr. Adler was effectively impeached on the record. Furthermore, I am dissatisfied with the piecemeal coverage that your office has given this matter heretofore. I know that this matter may be difficult. Therefore, I will help you with the issues:

- If Mr. Adler or the 2nd and 11th Committee cannot legally explain why preferential treatment was afforded the creditors of Russell S. Smith vis-a-vis Russell S. Smith's inability to act as a co-administrator, pursuant to the Court decree dated August 5, 1993 (attached), then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce two sets of stipulations signed by Joseph Smith and Harold Smith reforming personal loans of Russell S. Smith (Sussman and Mazza), then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler made payments to parties who failed to file claims against the Estate of

[1] The committee designated Docket No. K-1213-97 to the complaint. Note the attempt to misdirect the case history by affixing Docket No. K-2099-96 to Mr. Adler's November 20, 1997, statement.

Russell Smith, then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a "stipulation of counsel" between Mr. Adler and Valerie Hawkins, then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce an agreement embodying the statements made before the Surrogate regarding my petitions before the Court (pages 4-5 of the transcript), then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a formal writing from Valerie Hawkins, pursuant to Mr. Adler's letter dated December 12, 1994, withdrawing the petition to remove the Public Administrator, then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a stipulation of counsel between Mr. Adler and Valerie Hawkins, then the Committee allowed Mr. Adler to submit false statements.

- If Mr. Adler or the 2nd and 11th Committee cannot show that three Accountings were before the Surrogate on January 18, 1995, then the Committee allowed Mr. Adler to submit false statements (Mr. Adler's November 20, 1997 statement).

- If Mr. Adler cannot produce objections filed by my office to the Public Administrator's Accounting, then the Committee allowed Mr., Adler to submit false statements (Mr. Adler's September 4, 1997 statement, point 26).

- If Mr. Adler used the efforts of other parties to compromise or otherwise obstruct my petitions from being adjudicated, then Mr. Adler engaged in collusion.

Madame Justice, there is no need for a "full-scale re-investigation . . . ". The Committee was either provided with such from Mr. Adler to support their determination or not. The specifics are before you. Accordingly, I expect your office to weigh the concerns against the rules and laws that governs the conduct and behavior of attorneys, since the 2nd and 11th Committee failed to do that during its investigation. Neither the statute of limitation nor laches applies to disciplinary proceedings with respect to an attorney (Matter of O'Hara 63 A.D.2d 500 408 N.Y.S.2d 70).

Please review Mr. Adler's September 4, 1997, and November 20, 1997, statements, the Court decree dated August 5, 1993, as well as, the three letters included with these comments. I request a written reply of any action your office may intend to pursue.

I thank you for the time and assistance your office has offered so far in this matter.

Respectfully yours,

/s/ Clarence Harley
Clarence Harley

cc: J. Kaye, Chief Justice

EXHIBIT E

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of CLARENCE J. HARLEY, Petitioner, for a decree revoking the Letters of Administration of SAMUEL PLOTKIN, Public Administrator, Pursuant to SCPA § 712, THE ESTATE OF RUSSELL SMITH, Deceased.	**VERIFIED PETITION** File No. 3219/85 [Illegible] R.C.

TO THE SURROGATE'S COURT, COUNTY OF KINGS:

The Verified Petition of Clarence J. Harley respectfully alleges as follows:

1. Petitioner, CLARENCE J. HARLEY, a Public Accountant who maintains an office in Kings County, is a creditor of the estate of the above named deceased by virtue of the fact that in May 1988 petitioner was retained by Joseph L. Smith and Russell Sammuel [sic] Smith, distributees and former co-administrators of the estate of Russell Smith, deceased, to render accounting services to the said estate. (A copy of the agreement between your affiant and the former co-administrators dated November 10, 1989 is attached as Exhibit "A".)

2. Petitioner seeks to have the appointment of Sammuel Plotkin, as administrator of this estate, revoked on the grounds that said administrator, through his attorney Robert Adler, Esq. and the Law Office of Hesterberg and Keller, has engaged in conduct adverse to the interest of the subject estate, thereby putting in jeopardy

the ability of petitioner to collect upon his claim to the subject estate.

3. The deceased, Russell Smith died intestate, domiciled in Kings County, in 1984.

4. The distributees of the deceased are the above mentioned, Joseph L. Smith and Russell Sammuel Smith, and Harold Smith and Rickie Smith, who are nephews of the deceased and who are all brothers.

5. Upon information and belief, the assets of the subject estate consist of a three-family home located in Kings County, New York and two parcels of vacant land located in Suffolk County, New York. The value of said assets was approximately One Hundred Thousand ($100,000.00) Dollars at the time of the death of the deceased.

6. On or about August 11, 1986, the above mentioned nephews-distributees of deceased, Joseph L. Smith and Russell Samuel Smith, were appointed co-administrators of the subject estate by order of this Court.

7. Both before and during his appointment as co-administrator of the subject estate, Russell Samuel Smith engaged in conduct for his own personal gain and adverse to the interests of the subject estate. Such conduct included, but was not limited to, acting in the stead of Russell Smith, deceased, and mortgaging the above mentioned assets of the subject estate, unbeknownst to Joseph L. Smith.

8. In or about September 1989, Joseph L. Smith brought a petition against Russell Samuel Smith to revoke the appointment of Russell Samuel Smith as co-administrator of the subject estate.

9. Robert Adler, Esq. of the Law Firm of Hesterberg and Keller, represented Russell Samuel Smith in said revocation proceeding (See Exhibit A attached).

10. However, on or about August 9, 1993, this Court revoked the appointments of both Joseph L. Smith and Russell Samuel Smith as co-administrators of the subject estate and letters of administration were issued to Sammuel Plotkin, the Public Administrator. (See Exhibit B attached.)

11. On or about January 27, Robert Adler and the Law Firm of Hesterberg and Keller were appointed representatives of Sammuel Plotkin, the Public Administrator to administer the subject estate.

12. Petitioner herein seeks the revocation of the administration powers of Sammuel Plotkin, Public Administrator because the prior representation of Russell Samuel Smith by Robert Adler Esq. and the Law Firm of Hesterberg and Keller, the representatives of Sammuel Plotkin, presents a conflict of interest. Sammuel Plotkin has been advised of this conflict of interest (See Exhibit C attached.)

13. Moreover, since the appointment of Robert Adler, Esq. and Hesterberg and Keller, there has been a swift and systematic attempt to obscure and obfuscate the improper and illegal acts committed by Russell Samuel Smith as aforementioned.

14. Specifically, Robert Adler, Esq. and his said firm have sanctioned a contract to sell property of the subject estate, which was entered into by Russell Samuel Smith, despite their knowledge of his improper actions as a fiduciary of the subject estate. In addition to the fact that

Russell Samuel Smith lacked the authority to enter into said contract, the contract, upon information and belief, is an imprudent one because the contract price is far below market value. (See Exhibit D attached.)

15. Further, Robert Adler, Esq. and his firm are attempting to allow personal creditors of Russell Samuel Smith to become priority creditors of the estate, rather than attempting to defend the estate against said creditors. Robert Adler, Esq. has informed Petitioner that he wants to "reform" loans of Russell Samuel Smith so that the subject estate shall become the maker of same.

16. Indeed, Robert Adler, Esq. has attempted to cajole Joseph L. Smith to agree to and to sanction the improvident, deals and negotiations that he has set up with the personal creditor's of Russell Samuel Smith. There have been indications of record doctoring to minimize and obfuscate these transactions.

17. Russell Samuel Smith did not deal with his creditors as a fiduciary of the subject estate and he lacked the authority to enter into these deals. Therefore, any acts by him should be carefully scrutinized to determine whether they benefited the estate. Moreover, petitioner believes that this Court will find said dealings did not benefit the estate, Russell Samuel Smith's lack of authority notwithstanding. Thus, any creditor claims arising from the dealings of Russell Sammuel Smith should be null and void with respect to the subject estate.

* * *

WHEREFORE, it is respectfully requested that:

(1) that this Court issue an order immediately suspending the powers of Sammuel Plotkin, Public Administrator;

(2) that the appointment of Sammuel Plotkin as Administrator of the subject estate be revoked; and

(3) that this Court grant such other and further relief as this Court deems just, equitable and proper.

Dated: Kings County, New York
November 10, 1994

/s/ Clarence J. Harley
CLARENCE J. HARLEY

EXHIBIT F

Excerpt from Respondents Brief – Appellate Division

* * *

POINT I

THE COURT BELOW PROPERLY GRANTED ADLER'S MOTION BECAUSE HARLEY'S CLAIMS WERE PREVIOUSLY DISMISSED ON THE MERITS

Harley was afforded a full and fair opportunity to litigate his claims of fraud, deceit and collusion and the alleged violation of Judiciary Law § 487 in the context of the Estate proceeding and, in fact, specifically raised those issues in that proceeding (RA 27, ¶ 37). Harley's claims were properly dismissed by the Surrogate's Court. Having had a full opportunity to present these claims to the Surrogate's Court, the lower court properly precluded Harley, under the doctrines of *res judicata* and collateral estoppel, from pursuing further litigation against Adler and Hesterberg & Keller in relation to the same issues adjudicated in the Surrogate's court proceeding below.[11]

Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action. *Luce v. New York, C.&S.L.R. Co.*, 213 A.D. 374, 376-77, 211 N.Y.S. 184 (4th Dep't 1925), *appeal*

[11] It is respectfully noted that these issues are also the same issues Harley presented to the Grievance Committee which dismissed the grievance against Adler.

dismissed, 241 N.Y. 541, 150 N.E. 546 (1925) *aff'd*, 242 N.Y. 519, 152 N.E. 409 (1926), *Singleton Management Inc. v. Shakim Compere*, 243 A.D.2d 213, 673 N.Y.S.2d 381 (1st Dep't 1998).

New York Court's have been consistently clear that a judgment or settlement in one action is conclusive in a later action not only as to any matters actually litigated therein, but also as to all matters that *might have been readily litigated*, when the two causes of action have such an identity that a different judgment in the second would destroy or impair rights or interests established by the first.

EXHIBIT G

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Stipulation In The Accounting Of Russell S. Smith, as Former Co- Administrator Of The Estate Of Russell Smith, Deceased. Accounting Of Joseph L. Smith As Co-Administrator, Estate Of Russell Smith, Deceased.	File Number 85-3219

2 Johnson Street
Brooklyn, New York 11201

February 27, 1996

* * *

[6] And whereas the Court having scheduled a trial of the issues for February 27, 1996.

And whereas all of the parties knowing the uncertainty of a trial and wishing to resolve their differences without further expense and delay agree as follows:

Part indenting now in the transcriber's report the following agreements numbered as follows:

Number 1: Russell Smith hereby withdraws his objections to the accounting of Joseph Smith.

Number 2: Joseph Smith hereby withdraws his objections to the accounting of Russell Smith.

Number 3: The Public Administrator of Kings County hereby withdraws his objections to the accountings of both Russell Smith and Joseph Smith.

Number 4: Russell Smith hereby agrees to transfer his interest in the decedent Russell Smith's real estate located in Quogue, New York, to Joseph L. Smith.

The next number: Russell Smith will upon receipt of the necessary documents to transfer his interest in the real property in Quogue, New York, [7] to his brother Joseph Smith will execute those documents in a timely fashion and return them to the Public Administrator so that they can be delivered to Dennis Gayle as attorney for Joseph Smith.

Next number: The Public Administrator has been advised of possible additional assets belonging to the estate of Joseph Smith, namely at least one account originally held at the East New York Savings Bank now with the office of the State Comptroller as abandoned property, and perhaps an additional bank account in the name of Russell Smith which may have been misappropriated by a third party.

The public administrator hereby agrees to do whatever is necessary to obtain the proceeds of the East New York Savings Bank account presently held by the State Comptroller and do whatever it can to pursue whatever rights the estate may have against this unidentified third-party and/or the East New York Savings Bank.

The Public Administrator will file his final account as administrator within 90 days from the date of this Court's decision approving the [8] settlement – approving this settlement as agreed to by the parties.

The parties, namely Russell Smith and Joseph Smith, hereby reserve any and all rights they have to file any and all objections to the Public Administrator's account as administrator of the estate of Russell Smith.

Next number: The parties by entering into this agreement hereby release each other from any and all claims they have against each other with regard to the estate of Russell Smith; that is, Russell Smith hereby releases Joseph Smith from any claim he has against Joseph Smith for any acts Joseph Smith has taken either as co-fiduciary or in any capacity with regard to the estate of Russell Smith, and Joseph Smith hereby releases Russell Smith, his co-administrator in the same capacity.

And next number: The parties – the Public Administrator hereby releases any and all claims it has against Joseph Smith and Russell Smith for their acts as co-administrators of this estate of Russell Smith.

Next number for clarification: The deed transferring the ownership interest of Russell [9] Smith to Joseph Smith of the decedent Russell Smith's real property in Quogue, New York, shall be by quit claim deed.

THE COURT: Okay. Counsel, is that acceptable? Anything to add?

MR. GAYLE: That is acceptable on behalf of Joseph Smith. Nothing to add.

MR. GORDON: On behalf of Russell Smith the stipulation as dictated is acceptable.

THE COURT: Okay. Joseph Linn Smith?

JOSEPH SMITH: Yes.

THE COURT: Okay, have you been here while this stipulation was dictated on the record?

JOSEPH SMITH: Yes, I was.

THE COURT: Are you familiar with the terms of the stipulation?

JOSEPH SMITH: I am.

THE COURT: Do you understand the stipulation?

JOSEPH SMITH: I do.

THE COURT: Okay, have you consulted with your attorney regarding the terms and conditions of the stipulation?

JOSEPH SMITH: Yes, I have.

* * *

EXHIBIT H

EXCERPT FROM SURROGATE'S COURT HEARING HELD JANUARY 18, 1995

* * *

[8] JOSEPH SMITH: My name is Joseph L. Smith, excuse me. My name is Joseph L. Smith. I am one of the distributee –

THE COURT: Speak louder, please, because you have a mike in front of you. We don't have a reporter. You can sit down. Take it easy.

JOSEPH SMITH: Okay. I'm one of the distributees and one of the ex-co-administrators. My thing I had brought as a point of interest to the Surrogates Court was the fact that Mr. Adler had previously defended my brother concerning this very same estate. At the point of his being chosen to represent the surrogate, I brought that up again

* * *

[11] without the appointment of the Public Administrator.

Well, the next day or perhaps the day after, I received a call from Mr. Smith, Russell Smith, telling me that he had worked out his problems with his brother and there was not need for the conference. And I said, fine. I wrote him a letter telling him that he wouldn't proceed on his behalf. And that was, in all respects, the end of the matter.

Now, they – Mr. Joseph Smith, has raised this issue a couple of times. Your Honor, I think it's really – I don't think I should waste the Court's time anymore with regard to this issue. There are much more complicated issues before this court. I can only tell you, your Honor,

that in proceeding on behalf of the Public Administrator, I have filed as many, if not more, objections to the accounting of Russell Smith than I have with regard to the estate of – the accounting of Joseph Smith.

The Public Administrator's position isn't tainted in any way based upon a five-minute conversation that I had with Russell Smith five or

* * *

[24] THE COURT: I want to call the District Attorney's office. I want him picked up right away.

(DISCUSSION HELD OFF THE RECORD.)

THE COURT: Yea, put it on the record. There's no conflict of interest whatsoever here.

MR. HARLEY: Your Honor, I was – I appeared here in Court on the date that Mr. Adler represented Russell Smith.

MR. ADLER: Your Honor, your Honor, Mr. Harley – first of all, I'd like to say something to you. I never ever appeared in court and represented Russell Smith. Mr. Harley absolutely, your Honor, has no right, not only to make that statement, but Mr. Harley has no interest in this proceeding. He is proceeding improperly, he has a claim –

THE COURT: No. I want him to make the interest because you're a CPA?

MR. HARLEY: I'm a public accountant, sir.

MR. ADLER: No, he's not a CPA.

THE COURT: Oh, but you have a license?

MR. ADLER: He does not have a license as [25] a Certified Public Accountant.

THE COURT: Oh.

MR. ADLER: He holds himself out to be a public accountant.

THE COURT: Oh, okay. But I want that on the record. Okay, that statement that he made, I want it on the record. Okay. Because he's a party to this as far as I'm concerned. As far as the fines are concerned, he's involved in this thing too. Everybody is. As soon as he gets the date.

And, sir, who you do you represent?

MR. GORDON: Bryan Gordon, I represent Russell Smith.

THE COURT: What firm?

MR. GORDON: From Gordon, Jackson and Simon.

THE COURT: Oh, okay. Fine. Have you got a date?

MR. MUND: Monday, January 8, 199 –

THE COURT: Put this down. Monday, January 8, 1996, ten a.m. sharp in this court. And I'd advise you to contact that Mr. Gayle before I get to him or before he gets up here because he will be fined the sum of $10,000.00 too. And I

* * *

(2)

Supreme Court, U.S.
FILED
MAY 2 7 2005
OFFICE OF THE CLERK

No. 04-1194

IN THE

Supreme Court of the United States

CLARENCE HARLEY,

Petitioner,

v.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITION FOR REHEARING

CLARENCE HARLEY
2366 Seventh Avenue
Suite 2
New York, NY 10030
(212) 479-7375

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STATEMENT OF INTERVENING EVENTS

For the record, the petitioner submits additional relevant and controlling evidence in the form of current news articles and a press release from New York state comptroller, Allan Hevesi. The articles report on the "gross mismanagement" recurring in the kings county public administrator operations as well as the improprieties related to the surrogate judge and the attorney for the public administrator. These issues are of grave concern and have lead directly to public distrust in the judiciary residing in kings county.

ARGUMENT

The dismissal of the instant case before the Court was never about the law or the rules that governed the underlying issues in the case. The dismissal was more about a cover-up of unfair, unscrupulous and predatory practices within the king county's surrogate's court, kings county public administrator operations and the counsel to the public administrator.

The state auditors found problems with collection of the state property; failure to distribute monies to rightful heirs; inappropriate disbursements and failures to follow procedural guidelines. A press release indicated that prior reviews of the Public Administrator operations in 1987, 1992, and 1996 disclosed similar problems. (Appendix A, p 1a-2a). Consequently, these issues have been recurring and most likely, the estate of Russell Smith was caught up in the systemic problems during the Surrogate Bloom/Samuel Plotkin administration.

The kings county public administrator is entrusted with $57 million in assets and over 1000 open estate cases. These assets entrusted to the kings county administrator are, in light of the recurring mismanagement and lack of oversight controls, at risk to the corrosive and predatory practices identified

by the petitioner in his complaint and echoed by the state comptroller's audit.

Remarkably, the estate of Russell Smith transcended both the Surrogate Bloom/Samuel Plotkin and Surrogate Feinberg/ Marietta Small administrations. The petition disclosed that the estate was victimized by Smalls administration when she sold the Quoque property for $121,000 in August of 2000 when respondent Adler claimed that the property was transferred to the beneficiaries by deed in 1997.

The disposition of said funds are in question and conflicts with Small's statement in the New York Daily News article (Appendix B, p 4a) that it is unreasonable to conclude that estate assets are not being distributed to rightful beneficiaries.

The dismissal of the case denied the petitioner the opportunity to raise, inter alia, whether the mishandling of that property affected the petitioner's fees and/or whether the participating attorneys engaged in fraud, collusion and deceit. None of which was adjudicated in any prior proceeding.

In response to the clamor of corruption and improprieties chief judge, Judith Kaye, according to the New York Times article at Appendix D, p 6a-8a, appointed a special commission which recommended reforms for lawyers who handle estates of people who die without wills or heirs.

That is not the fix. It is not where the problem lies.

The problem lies when an aggrieved party is barred from commencing a subsequent action in civil court as a result of fiduciary improprieties or some other tort concerns during an estate administration.

Where and how does a party get relief after he/she has suffered financial loss as a result of mismanagement and/or predatory practices at the hands of the administrator or the administrator's attorney and/or both?

Typically, the accrual of a cause of action occurs long after the estate administrations have been finalized.

Why would the surrogate court be the place of venue for a lawsuit?

Instituting reforms for attorneys who handle estates for people who die is merely side-stepping the issues since the rules and regulations are already in place. Moreover, it is not just the attorneys. The flaw lies in the failure to deal with the systemic noncompliance within the judicial system.

The operating question is how has the corruption been able to sustain itself for so long?

The corruption has sustained itself through the issuance of discrepant decisions and the denial of considerations entitled to by plaintiff-parties during litigation.

The supreme court decision below is replete with discrepancies. In invoking res judicata in the instant case below Justice Ruchelsman writes, among other things, the following:

> "While the Surrogate decision awarding Plaintiff his fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order." (p 10a at Appendix D of original petition).

Commentary such as the foregoing are the type of discrepant statements that obscure the facts and the record and which have devastating effects on litigants. Neither does the record support the statement nor were allegations of fraud collusion or deceit raised in the application to suspend the letters of administration or raised in the application to validate the petitioner's fee as is reflected in the supplemental brief at S-App.11 and/or reflected within the petition for rehearing at Appendix E, p 9a-13a.

Res judicata is inapposite.

The respondents were allowed to evade the issues of the instant complaint at the appellate level, claiming that the fraud deceit and collusion revolved around respondent Adler's prior representation of Russell S. Smith. Thereafter, claiming

fraud and collusion were raised and adjudicated by the Surrogate (Appendix F, p 14a-15a) yet failed to prove that claim with evidentiary support.

The rules for invoking res judicata and the corollary doctrine collateral estoppel were consistently applied in *Garcia v Borelli* App 180 Cal.Rptr. 768. The California Court of Appeals, First District, held that Garcia found its content in an estate administration wherein the prior action related to the parties' entitlements under the will during probate proceedings, while the subsequent action involved the respondent attorney's negligence, inter alia, alleged misconduct in performing his duties as attorney for the executors of the estate.

The lower court ruled 'all damages claimed by plaintiffs in this action have already been adjudicated, ...' That constituted the courts ruling.

The California Court of Appeals reversed. The higher court found that just because the action involved the contents of the will as drafted, it did not seek further recovery from the estate of the Testator or from Wife. Nor did it seek to modify the settlement or judgment entered in the probate court proceedings.

Likewise, the case before the Court involved the content of an estate administration wherein the petitioner in an earlier action filed applications to have Samuel Plotkin's letters of administration revoked/suspended for, inter alia, alleged mismanagement of estate assets and another application to validate the petitioner's fees and reimbursements duly earned and due. The petitioner commenced the instant complaint 5 years later, charging the public administrator's attorneys with fraud and deceit and colluding with the other participating attorneys.

Most egregious is Justice Ruchelsman's discrepant commentary that . . . "a stipulation in open court whereby Adler agreed to withdraw his objections to the fees requested

and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment." (p 8a-9a at Appendix D of original petition).

When the record actually reflects:

> MR. ADLER: The parties have agreed as follows:
>
> That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim.
>
> The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to [206] remove the Public Administrator. (Appendix E, p 10a).

The cited commentary is ethically wrong and is exactly how corruption is orchestrated and sustained in kings county. One party covers for the other party so on and so on.

The lower court decision conflicts with the United States Court of Appeals decision in *Hernandez v City of Los Angeles* (624 F.2d 935 1980) on the issue of collateral estoppel. The burden of pleading and proving identity of issues rests on the party asserting collateral estoppel, and the party, to sustain such burden, must introduce record sufficient to reveal controlling facts and pinpoint the exact issues litigated in the prior action. Respondents failed to do this.

Before invoking the doctrine of collateral estoppel a determination of whether the party whom the doctrine is invoked had a full and fair opportunity to litigate the prior controversy must be made (Gramatan Home Investor Corp v Lopez 46 NY2d 481, 485) and (CRK Constr of Suffolk v Brown & Associates 260 AD2d 530). Both the cases were cited by the lower courts but neither the supreme court nor the appellate

court applied the comprehensive analysis to the instant case. The decisions are devoid of analysis.

The chief reason for the conflict in treatment of the case before the Court was to suppress the conduct of the public administrator and improprieties of the respondents. The conduct cannot continue. The removal of Surrogate Feinberg is a first step. However, the special commission appointed by chief judge Judith Kaye must address more.

CONCLUSION

The petition for writ of certiorari should be granted since the issues raised are current, relevant and of importance to the general public trust.

Respectfully submitted,

CLARENCE HARLEY
2366 Seventh Avenue
Suite 2
New York, NY 10030
(212) 479-7375

CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.

APPENDICES

APPENDIX A

[Seal] NEWS

From the Office of the New York State Comptroller
Alan G. Hevesi

CONTACT: Press Office (518) 474-4015 FOR RELEASE: Immediately April 19, 2004

Audit Finds Kings County Public Administrator Non-compliant with Estate Administration Laws and Regulations

The Kings County Public Administrator does not always follow many rules and regulations when administering the estates of Brooklyn residents who die without heirs, according to an audit released today by State Comptroller Alan G. Hevesi.

Auditors found a range of problems including irregularities in the collection of estate property, inappropriate disbursement of estate expenses, inadequate documentation of legal fees charged to estates and insufficient compliance with rules regarding selection of vendors.

"The Public Administrator is entrusted with the responsibility to handle the affairs of deceased New Yorkers, and must be held to the highest standards of operations and accountability, " Hevesi said. "The Kings County Public Administrator is managing well over a thousand estates valued at more than $57 million, and must ensure that those assets are not unnecessarily diminished and that they are distributed to heirs in a timely manner."

Specific findings by auditors included the following:

- More than three years after the Public Administrator's staff found U.S. Savings Bonds and stock certificates valued at approximately $84,000 in a safe-deposit box of a deceased individual, these assets had not been converted to cash as required.

- The Administrator distributed another deceased individual's estate assets to beneficiaries but failed to credit $2,675 worth of jewelry from the estate. More than a year later, the jewelry still had not been converted to cash.
- While the Administrator is permitted to charge estates an administrative fee of up to two percent of gross assets, one estate had been overcharged by $2,860 for this fee.
- The Administrator used an advertising firm to place death announcements in local newspapers. As a result, a death announcement that would have cost $840 if purchased directly by the Administrator instead cost $1,698. Auditors found other similar instances, and determined that six estates could have been saved a total of $4,324.
- There had been no annual independent audits of the Administrator's office, as required by law.

County Public Administrators are empowered under the Surrogate's Court Procedure Act to administer the estates of residents who die with no known heirs, or with heirs or executors who are not qualified or willing to administer the estate. The Act also created the Administrative Board of the Office of the Public Administrators. This 13-member Board, which includes one member appointed by the State Comptroller, sets policy for Public Administrator activities.

Prior reviews of Public Administrator operations in 1987, 1992 and 1996 found similar problems.

APPENDIX B

Hevesi Rips Official's 'Will' Power

By Larry Cohler-Esses
New York Daily News
April 22, 2004

It's practically a crime if you die without a will in Brooklyn.

A new report found gross mismanagement at the office of the Kings County public administrator, which handles the roughly $57 million left behind by Brooklynites who make no provision for their estate.

State Controller Alan Hevesi released an audit this week that found public Administrator Marietta Small withheld money from rightful heirs, miscalculated estate taxes and commissions, made inappropriate disbursements and violated regulations governing fees for lawyers and vendors.

Hevesi's auditors, who examined 10 estates, found that in six, assets had not been collected or credited to the estates "even though [Small] had knowledge of such property."

In one case, Small withheld almost $90,000 in stocks and bonds when she distributed an estate's assets, Hevesi reports.

In another, Small took $4,500 from estate funds to buy memorial plaques at local synagogues for several deceased people though "there was no evidence that the decedent requested such a plaque."

Some of those individuals had been dead for years.

"The public administrator is entrusted with the responsibility to handle the affairs of deceased New Yorkers, and must be held to the highest standards of operations and accountability," said Hevesi. Hevesi's report echoes findings

in separate investigations by the Daily News and state Attorney General Eliot Spitzer.

Those probes found Small's legal counsel, Louis Rosenthal, had taken hundreds of thousands of dollars in exorbitant fees without documenting the work he had done.

The state Commission on Judicial Conduct has charged Kings County Surrogate Michael Feinberg with misconduct for approving these fees.

Small responded it was "not reasonable to conclude that estate assets are not being distributed to rightful beneficiaries" based on Hevesi's limited sampling of cases.

The public administrator's office is an arm of Surrogate Court. Feinberg named Small to her $75,000 job in 1997.

APPENDIX C

Scandal-plagued Brooklyn Judge Benched

Zach Haberman
New York Post
February 23, 2005

Brooklyn Judge Michael Feinberg was ordered off the bench yesterday by the state's highest court.

The Surrogate Court judge, long accused of rewarding political pals with lucrative court appointments, was suspended by the Court of Appeals.

The judges said the suspension will be in effect pending "disposition of his request for review . . . by the state's Commission on Judicial Conduct."

Feinberg had appointed a lawyer named Louis Rosenthal guardian of estates of several people who died without leaving wills.

The 61-year-old judge is accused of allowing Rosenthal to collect $2 million more from the estates that he was entitled to.

Rosenthal was permited by law to award himself up to 6 percent of an estate, but Feinberg allegedly would allow him to take up to 8 percent.

APPENDIX D

State Commission Seeking
Ouster of Surrogate Judge in Brooklyn

By Leslie Eaton
New York Times
February 15, 2005

In the latest development in Brooklyn's long-running judicial scandals, the State Commission on Judicial Conduct announced yesterday that it was seeking the removal of the Kings County surrogate judge, contending that he improperly awarded millions of dollars in fees to a longtime friend.

The commission found that the judge, Michael H. Feinberg, appointed a neighborhood friend and law school classmate, Louis R. Rosenthal, to handle the legal matters of people who died without wills, He then rubber-stamped Mr. Rosenthal's fee requests of $9 million, including $2 million that the commission called "excessive."

Judge Feinberg will ask the state's highest court, the Court of Appeals, to review the commission's decision, said his lawyer, Harvey L. Greenberg, who declined to comment further. Mr. Rosenthal did not respond to telephone calls made to his office.

The commission did not find that the judge had received money from Mr. Rosenthal, although as an ethics commission it does not conduct criminal investigations, its executive director, Robert H. Tembeckjian, said. He would not comment further on the substance of the case, citing the Court of Appeals review.

The court could decide as early as the end of the week whether to suspend the judge pending its review, as it has done frequently when the commission calls for someone's removal from the bench. A decision on whether to remove

him permanently is unlikely before September, said Gary Spencer, a spokesman for the court.

Surrogates' courts are a somewhat obscure branch of the judicial system that handle wills and estates, a branch that has become infamous because of some judges' clubby habits of awarding huge fees to politically connected lawyers.

The possibilities for patronage have helped make the surrogates' elections important to political parties, if not to voters. With support from Mr. Rosenthal, Judge Feinberg was elected in 1996 after a bitter Democratic primary battle in which the contestants spent $1 million, a battle that solidified the power of his chief backer, Clarence Norman Jr., the Brooklyn party leader.

The party's control over judicial positions in Brooklyn has come under scrutiny because of a series of scandals over judges it has backed. In recent years, one State Supreme Court justice there has been sentenced to prison for taking a bribe, another was removed from the bench for financial improprieties, and a third, Gerald P. Garson, has been charged with receiving bribes in divorce cases; he has pleaded not guilty.

The Brooklyn Surrogate's Court has been the focus of investigative articles by The Daily News and has been investigated by the state comptroller, Alan G. Hevesi, and by the attorney general, Eliot Spitzer, whose investigation is continuing, according to a spokeswoman.

A special commission appointed by the state's chief judge, Judith S. Kaye, recommended a number of reforms last week dealing in particular with the lawyers hired to handle the estates of people who die without wills or heirs, a position known as the counsel to the public administrator.

That is the position held by Mr. Rosenthal, who like Judge Feinberg had been active in the Democratic Party and has

also served as a judge, though he is now in private practice. According to the commission's decision, his father was the public administrator in Brooklyn from 1958 to 1964, though only about 5 percent of his own legal practice concerned surrogates litigation.

Judge Feinberg appointed Mr. Rosenthal shortly after he became surrogate, and began to award him legal fees for handling estates without requiring documentation about the time and effort he put in. The judge also routinely approved legal fees equal to 8 percent of the value of the estate in question, despite the fact that fees are supposed to be limited to 6 percent except in exceptional circumstances.

APPENDIX E

Excerpt from Surrogate's Court Hearing
January 18, 1995

[204] THE COURT: Good morning.

ALL PRESENT: Good morning.

THE COURT: I want one thing understood. No more conferences between the parties in this matter. I don't want it settled. Under no circumstances do I want to settled. And I have been admonished by the Appellate Division to fine each side a sum of $10,000.00 in this case. I will hold it in abeyance, but I intend to fine each party the sum of $10,000.00. And then I will assign another judge to hear the hearing on the fine. Just so we understand one another.

Let's proceed. Do you have all the appearances?

MR. NOCERA: Yes.

THE COURT: Okay, open up.

MR. ADLER: Perhaps we should place on the record, if I might, your Honor, the one area of this proceeding which we have agreed upon, and that is the claim of Mr.—

THE COURT: I don't even want to hear about what you agreed upon. I want it all tried.

MR. ADLER: Except that all of the parties, your Honor, have agreed to one issue that [205] we resolved. There's no need to try that issue, your Honor. There's a claim here filed by the accountant which all the parties have agreed to submit to you for determination based upon the quantity of—

THE COURT: Is that the fellow that's requesting $15,000.00?

MR. ADLER: That's correct, your Honor. And the parties have agreed as follows:

> Mr. Harley, Clarence Harley, the claimant in both the estates of—I'm sorry, claimant in the proceedings brought by both Joseph Smith and Russell Smith has filed a claim in a sum of $15,000.00 for services rendered to the estate as an accountant. The parties have agreed as follows:
>
> That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim.
>
> The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to [206] remove the Public Administrator.

THE COURT: He what?

MR. ADLER: There is pending before this Court two petitions. One petition by Mr. Harley seeks to have his fee fixed, which is really basically very similar, if not exactly the same issue, that's now before the Court with regard to the accounting proceedings. He has also made an application as a creditor to remove the Public Administrator as—

THE COURT: On what grounds?

MR. ADLER: There are several grounds listed, but the point of the matter is, your Honor, that—

THE COURT: Is this because of a prior conference of some type?

MR. ADLER: The point is that the parties have agreed that it's unnecessary since the Public Administrator is not seeking to object to the fee request of Mr. Harley. To rehash that issue, I believe with all due respect, your Honor, is unnecessary, because the parties have gotten beyond that issue.

* * * *

[209] JOSEPH SMITH: Okay. I'm one of the distributees and one of the ex-co-administrators. My thing I had brought as a point of interest to the Surrogates Court was the fact that Mr. Adler had previously defended my brother concerning this very same estate. At the point of his being chosen to represent the [public administrator], I brought that up again [210] and he has still proceeded to be the attorney. There is a definite blatant conflict of interest here.

MR. ADLER: Your Honor, if I might be heard. Mr. Smith has raised—

JOSEPH SMITH: I have paperwork on that.

MR. ADLER: Mr. Smith has raised this issue several times.

THE COURT: I read it all in here.

MR. ADLER: And the Court basically has—as I understand it, I don't want to rehash all of this.

THE COURT: Is this the one where you had a conference of some type?

MR. ADLER: What happened, your Honor, is, and it's only because my memory has been refreshed from the original instance because I did not remember it, but as best as I can recall, what happened very simply is about five or six years ago, Mr. Russell Smith came to the Public Administrator's—came to our office asking that the Public Administrator be appointed the administrator of his [Uncle's] estate, notwithstanding that he and his brother Joseph [211] Smith were co-administrators. He told me that they couldn't get along. They were having a problem. Is there something the Public Administrator could do.

What I did, as best as I can recollect and reconstruct, is I called your former law secretary, George Mack, and asked him if we could conference the matter, okay. And he said yes. And I told Mr. Smith that the matter would be conferenced,

and a few days before Mr. Mack, and I told him that I would advise the parties accordingly.

What happened after that is that—first of all, I didn't retain—I mean, I wasn't retained by Mr. Smith, Russell Smith. He didn't retain me. I didn't ask to be retained. He was proceeding to have the Public Administrator appointed, and as attorney for the Public Administrator I happened to be the one he spoke to.

I didn't get any information about the estate from Russell Smith. He didn't give me anything relevant with regard to it, other than the fact that he was having a dispute with his brother and he thought that it couldn't be worked out [212] without the appointment of the Public Administrator.

Well, the next day or perhaps the day after, I received a call from Mr. Smith, Russell Smith, telling me that he had worked out his problems with his brother and there was no need for the conference. And I said, fine. I wrote him a letter telling him that we wouldn't proceed on his behalf. And that was, in all respects, the end of the matter.

Now, they—Mr. Joseph Smith, has raised this issue a couple of times. Your Honor, I think it's really—I don't think I should waste the Court's time anymore with regard to this issue. There are much more complicated issues before this Court. I can only tell you, your Honor, that in proceeding on behalf of the Public Administrator, I have filed as many, if not more, objections to the accounting of Russell Smith than I have with regard to the estate of—the accounting of Joseph Smith.

The Public Administrator's position isn't tainted in any way based upon a five-minute conversation that I had with Russell Smith five or [213] six years ago. And the truth of the matter is, your Honor, I state it in open court, when they first told me about this a year ago, I had absolutely no recollection of ever having met Russell Smith. However, based upon a

reconstruction of some of the letters that went back and forth, I do recall the situation exactly as I've repeated it to you.

But with all due respect, your Honor, I think that this issue is being raised now as a desperate, a desperate attempt to cloud what really is before this Court, and that is the accounting of Joseph Smith and the accounting of Russell Smith.

APPENDIX F

RESPONDENT'S BRIEF
NY SUPREME COURT
APPELLATE DIVISION
2ND DEPARTMENT

* * *

A review of Harley's claims in the Supreme Court action reveals that all of the allegations of professional misconduct, fraud, deceit and collusion revolve around Adler's purported confiict of interest due to his prior dealings with Russell S. Smith (RA 23, ¶ 14).

* * *

Harley's complaint also alleges that Hesterberg & Keller's exercise of authority was wrongful and prevented Harley from obtaining his full fee claim (RA 25. ¶ 28). Harley fails to acknowledge that the Surrogate extended his deadline for filing supporting documentation on no less then two occasions (RA 61). His assertion that he was never made aware of the Court's request (RA 33, ¶¶ 75-80) is belied by the Court order which states that [on] January 18, 1995, [Harley] requested and received 30 days within which to supplement his application in any manner he wished. When it appeared that [Harley] was unable to meet this submission deadline, the court enlarged it to June 10, 1995" (RA 61). It was Harley's own failure to submit the appropriate documentation to the Surrogate that caused the reduction in fees and not any acts by Adler.

* * *

However, much like Harley's failure to support his claims in Surrogate's Court, Harley failed to produce any evidence whatsoever to support his claims herein. Harley's claims have already been litigated in the Surrogate's Court. Any claims of fraud, deceit and collusion should have been raised in the

Surrogate's Court action and were raised in those proceedings. Accordingly, Harley's claims had been previously adjudicated and were found to have been lacking in merit and were barred by res judicata and collateral estoppel by the Court's prior order in the Surrogate's proceeding.